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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED DECEMBER 22, 1931

CERTIORARI GRANTED JANUARY 25, 1932

(36,399)

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[fol. 1] [Caption omitted]

IN DISTRICT COURT OF HENNEPIN COUNTY

JAMES M. BORUM, Plaintiff,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant

Settled Case

AGREEMENT OF SUBMISSION TO ARBITRATION UNDER CHAPTER 81, GENERAL STATUTES, MINNESOTA, 1923

Know all men:

That James M. Borum of Minneapolis, Minnesota, herein designated as plaintiff, and Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a railway corporation, having its principal office and place of business at Minneapolis, Minnesota, herein designated as defendant, have [fol. 2] agreed to, and do hereby, submit all demands, claims, issues and matters in dispute between them, both as to law and fact set forth and comprehended within the pleadings hereto annexed, to the determination of Mathew M. Joyce of Minneapolis, Minnesota; Harry S. Stearns of St. Paul, Minnesota, and John P. Devaney of Minneapolis, Minnesota; the award of whom, or a majority of whom, being made and reported within forty days from this date to the District Court of the county of Hennepin, the judgment thereon shall be final.

As part hereof, it is further agreed and stipulated:

1. That James M. Borum, party hereto and herein designated as plaintiff, suffered injury resulting in the loss of both legs below the knee while acting as a switchman in said railway company's yards at Minneapolis, Minnesota, on the 11th day of December, 1928, which injury is the basis of the action hereinafter referred to and covered by the pleadings hereto annexed.

2. That the nature of defendant's business and of the work which plaintiff was doing at the time of said injury was such as to bring both parties within the Federal Employers' Liability Act, if plaintiff be held an employe of defendant within the meaning of said act.

3. That the circumstances of the infliction of said injury were such as to make a jury question as to the negligence of defendant, its agents or servants, proximately causing, or contributing to, said injury.

[fol. 3] 4. That suit for said injury was duly brought under the Federal Employers' Liability Act as shown by said pleadings; that the question of whether plaintiff was, at the time of said injury, an employe within the meaning of said act and as such entitled to all the benefits and privileges thereof, is in controversy herein; that if he was not at said time an employe within the meaning of said act and entitled to all the benefits and privileges thereof, he has no cause of action against the defendant.

5. That, irrespective of the question of its legal liability for such injury, defendant has paid to plaintiff the sum of $12,500 on account of said injury; which said sum of $12,500 plaintiff may retain whatever may be the decision herein on the merits and legal questions involved.

6. That if the decision herein shall be in favor of plaintiff and he shall be held an employe of defendant within the meaning of and entitled to all the benefits and privileges of the Federal Employers' Liability Act at the time of receiving such injury, the amount of the award herein shall be an additional $12,500 without deduction of any part of the $12,500 heretofore paid.

7. That defendant will pay the costs of this arbitration proceeding as such costs may be fixed by the arbitrators.

Dated this 17th day of September, 1929.

James M. Borum, Plaintiff. Davis, Michel & Yae-
[fol. 4] ger, Counsel for Plaintiff. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant, by C. T. Jaffray, President. C. S. Pope, Secretary. (Corporate Seal.) John E. Palmer, James L. Hetland, Counsel for Defendant.

Duly sworn to by James M. Borum et al. Jurats omitted in printing.

[fol. 5] Pleadings annexed to arbitration agreement as follows:

IN DISTRICT COURT OF DOUGLAS COUNTY, SEVENTH JUDICIAL DISTRICT

[Title omitted]

COMPLAINT

Plaintiff for his complaint in the above entitled action, alleges and shows to this court:

1st. That the defendant now is and at all times herein [fol. 6] mentioned has been a corporation duly organized and existing under and by virtue of the laws of the state of Minnesota, and as such operating a commercial line of railway in the state of Minnesota, and other states, hauling freight and passengers thereon as a common carrier for hire.

2nd. That on and previous to the 11th day of December, 1928, the above named plaintiff was employed by defendant as its agent and servant and as a railway switchman, and as such it was his duty to work on, around, and about the switch yards, engines and cars of defendant, and to do the work ordinarily and commonly done by persons similarly employed.

3rd. That at all times herein mentioned the defendant was an interstate carrier and was engaged in interstate commerce, and that plaintiff was employed by defendant as its servant and employe, and as such was working and engaged in interstate commerce at the time of receiving the injuries herein set forth.

4th. That on the 11th day of December, 1928, while plaintiff was employed as such railway switchman for defendant, as aforesaid, and while he was working within the scope and course of his employment and within the line of his duties, he was engaged in certain switching operations in the Shoreham Yards of defendant in the city of Minneapolis, in the State of Minnesota; that in said yards there were at said time two certain lead tracks, one of said lead [fol. 7] tracks being known as the B lead or scale lead track, and the other of said tracks being known as the A lead track;

that plaintiff was working with a certain crew of railway switchmen, and in the doing of said work it became and was necessary for him to give and transmit signals to the engineer of his crew; that at said time said engineer was in charge of a locomotive engine which was pushing and shoving certain railway freight cars along said B or scale lead track in a southwesterly direction; that in the doing of said work by plaintiff and in the giving of said signals, it became and was necessary for him to be and stand, because of a curve in said B lead track, upon said A lead track aforesaid; that plaintiff did so go upon said A lead track so to give signals, as herein alleged; that at said time a certain other switching locomotive of defendant was upon said A lead track headed in a southwesterly direction and that said locomotive was to the north and east of plaintiff; that at the time plaintiff took his position upon said A lead track, said locomotive thereon was standing still; that the same was in charge of a locomotive engineer and that the movements of said locomotive were controlled and directed by said locomotive engineer and by a certain switch foreman both of whom were agents and servants of defendant; that at said time and place it was and had been for many years the custom and practice of defendant not to move or cause to be moved any switching locomotive situated similarly to said locomotive on said A lead track without first causing the headlight of said locomotive [fol. 8] to be lighted, and without first giving a signal by bell or otherwise in advance of said movement; that it was further at all of said times customary, before moving a switch engine as situated, to have a switchman or other person upon the forward footboard thereof, but at the time and place aforesaid, the defendant, its agents and servants in charge of said locomotive engine on said A lead track, well knowing of the presence of plaintiff upon said track for the purpose of giving signals, as aforesaid, negligently, recklessly and carelessly, and without any warning or notice to plaintiff, and without any signal by bell or otherwise, and without having any switchman or person on the forward footboard of said locomotive, and without causing the forward headlight thereof to be lighted, and contrary to the custom existing in said yards, as aforesaid, caused said locomotive to run onto and against plaintiff.

That at said time said A lead track, upon and about

which plaintiff was working and about which he was so standing, as aforesaid, was allowed to be, and the same was, in a dangerous and unsafe condition in this, to-wit: That defendant negligently allowed ice, snow, rubbish, bricks and debris to be and accumulate between said tracks; that defendant negligently allowed ice to accumulate in ridges between the rails of said track, and that said track was unsafe for use by switchmen; that by reason of the negligence of defendant, as aforesaid, in the moving of said switch engine, plaintiff was placed in a position of [fol. 9] peril and danger, and as he attempted to extricate himself therefrom and get off said track, he was caused to and did fall and stumble over said debris and upon said ice so between said rails, and that by reason thereof and by reason of each and all of the acts of negligence of defendant, hereinbefore set forth, plaintiff was struck by said locomotive engine, and knocked to the ground; that both of his legs were run over by said locomotive engine and that he sustained the severe and permanent injuries hereinafter alleged.

5th. That by reason of the negligence of defendant, as hereinbefore set forth, plaintiff was severely injured in and about his head, neck, shoulders, back and spine; that both of his legs were so severely bruised, crushed and mangled that it became and was necessary to amputate both of said legs at a point below the knee, and the same were so amputated; that plaintiff was severely and permanently injured in and about his hips; that he sustained a severe shock to his nervous system; that he suffered a great loss of blood; that he sustained severe internal injuries; that his general health and well-being have been permanently and greatly impaired and diminished; that all of said injuries caused plaintiff great pain and suffering and he is advised and believes that all of the same are permanent and that he will always suffer therefrom.

That because of plaintiff's condition and due to defendant's negligence, as herein set forth, it will be necessary for plaintiff during the remainder of his life to have a nurse or attendant in constant attendance upon him, to care and [fol. 10] administer to his needs, and that the reasonable charge and cost for such person is and will be the sum of one hundred fifty ($150.00) dollars per month, and that

plaintiff will be obliged to expend such sum for such care and maintenance during the rest of his lifetime.

6th. That previous to his injuries, plaintiff was an able-bodied man and could and did earn at his employment as a railway switchman approximately two hundred ($200.00) dollars per month; but that by reason of being injured, as herein set forth, plaintiff's earning capacity has been wholly lost and destroyed, and that plaintiff will never again be able to perform manual labor.

7th. That by reason of all the facts aforesaid, plaintiff has been injured to his damage in the sum of eighty thousand ($80,000.00) dollars.

Wherefore, plaintiff demands judgment against defendant in the sum of eighty thousand ($80,000) dollars, together with the costs and disbursements of this action.

Davis, Michel & Yaeger, Attorneys for Plaintiff, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 11] In District Court of Douglas County

Venue changed to District Court of Hennepin County, Fourth Judicial District.

[Title omitted]

Amended Answer

Defendant interposes the following amended answer to the complaint:

I

It admits that it is, and at all material times was, a railway corporation operating a system of railroads in Minnesota and adjacent states as a common carrier of passengers and freight. It admits that it maintains in connection with said system extensive yards and shops in northeast Minneapolis known as Shoreham Yards. It admits that on or about December 11, 1922, plaintiff was assuming to act as a railway switchman in its said yards. It admits the inter-

state character of its said business and of the work in which plaintiff assumed to act as switchman. It admits that at said time and place plaintiff sustained injuries resulting in [fol. 12] amputation of both feet. It specifically denies that said accident and resulting injury were caused by any negligence, want of care or breach of legal duty on the part of defendant.

II

It denies that at said time and place plaintiff was an employe of defendant or was entitled to the benefits of the Federal Employers' Liability Act. It alleges that plaintiff secured his purported employment through false and fraudulent representations as follows: That at the time plaintiff applied for employment and ever since defendant had promulgated and there was in full force and effect a rule or regulation providing that no person over 45 years of age should be taken into its railway service. That said rule or regulation had the purpose and effect of promoting the efficiency and safety of its railway transportation service and of its employes and passengers. That at the time plaintiff applied for employment he was four or five years past the age of 45 and ineligible for employment under defendant's said rule or regulation. That when so applying he knowingly, falsely, fraudulently, and with intent to deceive defendant, misrepresented his age in writing to defendant and stated that his age was 39 years. That defendant was thereby deceived and relied upon plaintiff's representation, and because of such misrepresentation permitted him to perform the work of a switchman for defendant. That defendant did not at any time know of plaintiff's misrepresentation until after he sustained the injury which is the basis of this action and until after this [fol. 13] action was commenced and answer interposed.

III

It alleges that said accident and resulting injury were due to risks and hazards which plaintiff knowingly and voluntarily assumed and that plaintiff unnecessarily assumed a position of danger in connection with the performance of the work. It alleges that said accident and resulting injury were directly and solely caused by the negligence and want of care of the plaintiff himself and that plaintiff's

own negligence and want of care directly and proximately contributed thereto.

IV

It expressly denies each and every allegation, averment, matter and thing and each and every part thereof in said complaint contained, save as hereinbefore admitted or qualified.

Wherefore defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements herein.

Dated August 19, 1929.

John E. Palmer and James L. Hetland, 1427 First Nat'l-Soo Line Bldg., Minneapolis, Minnesota, Attorneys for Defendant.

[fol. 14] In District Court of Douglas County

Venue changed to District Court of Hennepin County.

[Title omitted]

Reply to Amended Answer

Plaintiff, for his reply to the amended answer of the defendant in the above entitled action, alleges and shows to this court:

1st. Except in so far as said amended answer admits the allegations of plaintiff's complaint, every allegation, matter and thing therein contained is denied.

2nd. Plaintiff specifically denies that portion of paragraph II of said amended answer wherein it is alleged and set forth that plaintiff was not an employee of the defendant at the time he was injured, as alleged in plaintiff's complaint, and plaintiff specifically alleges that he was at said time an employee of the defendant.

3rd. Plaintiff specifically denies that he secured his employment through any false or fraudulent representations [fol. 15] as to his age at the time of securing such employment, and plaintiff specifically alleges and sets forth that

at the time he secured his employment, the defendant, its agents and servants, fully and well knew plaintiff's age to be more than thirty-nine years, and that at the time of securing his employment, plaintiff and defendant both fully understood and agreed that plaintiff's age was more than thirty-nine years, but that at the instance and request of defendant, this plaintiff did state his age to be thirty-nine years at the time of so securing such employment; that plaintiff last secured employment from the defendant in October, 1921, and that he continued in the employment of defendant from said October, 1921, to the 11th day of December, 1928, when plaintiff was injured as alleged in the complaint herein; that plaintiff at no time attempted to deceive defendant as to his age, and that defendant was fully informed and knew that plaintiff was more than thirty-nine years of age, and that the statement in plaintiff's application for employment, if it be to the effect that plaintiff was thirty-nine years of age, was made with the knowledge, acquiescence, consent, and at the express suggestion and direction of defendant; plaintiff alleges that the defendant, acting by and through its agents and servants hiring and employing him, personally knew plaintiff and had personal knowledge as to plaintiff's age, and that from such knowledge and that because of the personal appearance of plaintiff, said defendant well knew at the time [fol. 16] plaintiff was employed that he was more than thirty-nine years of age.

4th. Plaintiff further alleges that he continued in the employment of defendant for more than seven years after securing employment previous to his injuries, as alleged in the complaint herein, and that during all of said time, the defendant, its agents and officers who employed plaintiff and under whom plaintiff worked, knew this plaintiff well and intimately, and well knew that plaintiff was over the age of thirty-nine years at the time he received employment, and well knew that plaintiff was over the age of forty-five years; that defendant at said time had such knowledge and well knew of such fact at all times from the date of such employment to the time of the injury to plaintiff, as alleged in the complaint herein.

Plaintiff specifically alleges that that portion of paragraph II of defendant's amended answer to the effect that

defendant did not know of the age of plaintiff until after this action was commenced is incorrect and untrue; that the age of this plaintiff during all of the period he worked for defendant, was well and fully known to defendant, its agents and servants.

5th. Plaintiff further alleges that at all times mentioned from and after the signing of the application mentioned in defendant's amended answer and while plaintiff was working as a railway switchman for defendant, he was strong, healthy and able-bodied, and capable of performing his [fol. 17] duties as such railway switchman in an efficient and proper manner, and in the manner in which such duties are ordinarily and customarily performed.

Wherefore plaintiff demands judgment as prayed for in said complaint.

Dated this 21st day of August, 1929.

Davis, Michel & Yaeger, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

In District Court of Hennepin County

Arbitration Proceedings under Chapter 81, General Statutes, Minnesota, 1923

Oath of Arbitrator

I, Mathew M. Joyce, do swear that I will faithfully and justly perform all the duties of the office and trust which I now assume as arbitrator in the above entitled matter [fol. 18] and proceedings, to the best of my ability. So help me God.

M. M. Joyce.

Subscribed and sworn to before me this 3rd day of October, 1929. Hugo J. Ackerman, Notary Public, Hennepin County, Minn. My commission expires Jan. 26th, 1932. (Notarial Seal.)

Oath of arbitrator, Harry S. Stearns, identical with that of M. M. Joyce.

Oath of arbitrator, John P. Devaney, identical with that of M. M. Joyce.

In District Court of Hennepin County

Order Setting Cause

The agreement of the parties for submission to arbitration in the above entitled matter having been duly presented to the arbitrators therein named, it is

Ordered:

That said matter is hereby set for hearing by and before the undersigned arbitrators at two o'clock P. M. on October 3, 1929, at Room 1708 First National-Soo Line Building, in the city of Minneapolis, Hennepin county, Minnesota; at [fol. 19] which time and place the parties and their witnesses will appear and be heard.

Dated October 2, 1929.

M. M. Joyce, Harry S. Stearns, John P. Devaney, Arbitrators.

In District Court of Hennepin County

James M. Borum, Plaintiff,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

Statement of Evidence

Caption

Hearing before arbitrators, Mathew M. Joyce, Esq., Harry S. Stearns, Esq., and John P. Devaney, Esq., commencing on October 3, 1929, at two o'clock P. M., pursuant to the annexed agreement and order

Appearances: Arbitrators, Mathew M. Joyce, Esq., chairman; Harry S. Stearns, Esq., John P. Devaney, Esq., Messrs. Davis, Michel & Yaeger, represented by Mr. Davis, and Mr. Michel, appearing on behalf of plaintiff; John E. Palmer, Esq., appearing on behalf of defendant.

[fol. 20] Thereupon the following proceedings were had, and testimony taken:

PLAINTIFF'S CASE

Mr. Davis: I ask to have this map marked as Plaintiff's Exhibit A.

(Document marked Plaintiff's Exhibit A for identification by the reporter.)

JAMES M. BORUM, sworn, testified as follows:

Direct examination.

By Mr. Davis:

Q. State your full name.
A. James Monroe Borum.
Q. Were you formerly employed by the Soo Railroad?
A. Yes, sir.
Q. When did you last start working for them?
A. 1921.
Q. And you continued that employment from what time in 1921, to what time?
A. Up to 1928, December 11th.
Q. In what capacity did you work for them?
A. Switchman.
Q. Where did you work?
A. Shoreham.
Q. That is in Minneapolis?
A. North Minneapolis.
Q. This work as switchman consists of switching cars, and setting brakes, and uncoupling cars, and general work in the yards at Shoreham?
[fol. 21] A. Yes.
Q. With reference to that work, does it require you to move about in cold weather over the tracks in the yard, and climb up and down the cars, and setting brakes?
A. It does.
Q. The switching is done by means of signals, is it?
A. Yes, sir.
Q. Signals are given to you by the foreman of the switch crew, as to certain movements?
A. Yes, sir.

Q. In the daytime those signals are given by hand, I presume?

A. Yes, sir.

Q. In the nighttime, how are they given?

A. By lamps.

Q. By lamp or lantern?

A. Yes, sir.

Q. And those signals, given in certain ways, means certain movements of cars?

A. They do.

Q. Here is the general lay-out of the Shoreham yards of the Soo Railroad at Minneapolis?

A. Yes.

Q. I hand you Plaintiff's Exhibit A, look at it, and state whether it represents substantially the condition of the yards at the time of your injury.

(Document submitted to the witness.)

A. Yes, sir.

Q. Calling your attention to the red line (indicating), [fol. 22] will you tell the arbitrators what that represents?

A. That is the A yard lead.

Q. There is marked up here (indicating) "A-12 switch"; is that track 12?

A. Yes, sir.

Q. I notice a track towards the top of the exhibit, running from the right-hand side, above the word "Exhibit A," over toward the left; what does that represent?

A. The main line.

Q. The track next below that is—what?

A. That is what we call the scale lead.

Q. They run substantially parallel down toward the left of this plat?

A. Yes, sir.

Q. Through the east switch of cross-over?

A. Yes, sir.

Q. On this night in question, were you engaged in switching operations?

A. Yes, sir.

Q. Were you switching a string of cars?

A. Yes, sir.

Q. These cars were part loads and part empties?

A. Yes, sir.

Q. Do you know from your work there where some of these cars were destined to?

A. Yes, sir.

Q. To what points?

A. Some were destined for Canada; some for Wisconsin, and also some for Duluth.

[fol. 23] Q. These cars that were destined for Wisconsin and Canada were part of the string of cars upon which you were working that night when you were hurt?

A. Yes, sir.

Q. I will ask you if there were also cars destined for Portal, North Dakota?

A. Yes, sir.

Q. Shortly before your injury, do you recall about how many cars this engine had a hold of?

A. As near as I can remember, it had a hold of about eighteen or twenty cars. Loads and empties.

Q. About how many loads and about how many empties?

A. That is a mixed up drag from the local downtown; there is about four or five loads, and the rest empties, as near as I can remember.

Q. Over to the right, on this exhibit, what track would you call that, as the track runs there (indicating)?

A. According to the map there, this would be west—east and west (indicating).

Q. Then to the left of the plat would be east?

A. Yes. But you see the direction is north and south.

Q. I mean in railroad parlance.

A. That would be east and west.

Q. Where were you shortly before the accident; where was your engine and string of cars, on what track?

[fol. 24] A. The engine was on this scale lead (indicating).

Q. That is the track just below the main line?

A. Yes, sir.

Q. Which way was the engine heading, as to being east or west?

A. The engine was headed west.

Q. Were the cars to the east or west of the engine?

A. West of the engine.

Q. When they were moving, was the engine pushing the cars up the lead to the west?

A. Over on the B lead.

Q. What were you doing with that string of cars; what were you going to do with them at that time?

A. We were switching them out where they belonged.

Mr. Palmer: Mr. Davis, you did not identify the B lead.

By Mr. Davis:

Q. The B lead would be represented over on the right-hand side, coupling with number 5 and 6 and number 7 and 8 switch there; is that correct?

A. Yes.

Q. These cars were being switched or pushed or kicked into the B yard?

A. Yes, over this switch here (indicating).

Q. Over the switch known as the west switch of cross-over?

A. Yes; here (indicating); this is the B yard lead from the scale switch.

[fol. 25] Q. Then you were switching them over the B yard lead switch?

A. Yes, into the B yard.

Q. Where were you shortly before the accident; where were you working?

A. I was here (indicating) at this sixth switch, the B switch.

Q. Number six switch?

A. Yes.

Q. What was your work there?

A. Throwing the switch. The switch is on the left-hand side of the engine, and I had to be over there, and the foreman is on the right side, on this side of the track (indicating).

Q. When you threw these switches, did you go up this way (indicating)?

A. No; my work is all right down here (indicating).

Q. Do you know where the crossing is there?

A. Yes.

Q. Does that substantially represent the crossing (indicating)?

A. Yes, sir.

Q. I notice here there is a spike driven in the center of the track; do you know what that represents?

A. Yes.

Q. What does it represent?

A. While we were switching here, over on the B yards lead, putting these cars away, there was an engine pulled into the A yard, with a drag of cars—that is what I under-
[fol. 26] stand—then we backed up here onto this crossing (indicating).

Q. Beyond the crossing?

A. Yes, and our engine was up here, over these cross-overs up here (indicating).

Mr. Palmer: You had better identify those.

By Mr. Davis:

Q. The west switch of cross-over at that point (indicating)?

A. Yes, sir.

Q. We will put the word "engine" here; is that substantially where your engine was?

A. It might have been a little bit farther; it might have been a little bit more this way, as near as I can say.

Q. Your engine that had your cars was up here (indicating)?

A. Yes, on the scale lead, switching off into the B yard.

By Mr. Palmer: Is the scale lead the same as the B yard lead?

A. The B yard lead is connected with the scale lead.

By Mr. Davis:

Q. What does that spike represent there (indicating)?

A. This engine came in from the A yard, backs up there, and backs up on the crossing, and obstructed the view of the foreman that is running the cars.

Q. That was not the engine you were working on?

A. No.

[fol. 27] Q. Which way was the pilot of that engine facing, was it facing east or west?

A. It was headed west.

Q. It backed up on the A yard lead?

A. Yes.

Q. That interfered with your view of—what?

A. With the foreman's view; he could not get any signal back to the engineer.

Q. Where was the foreman?

A. The foreman was here, at the sixth switch, B yard switch.

Q. Where were you?

A. I came around over here (indicating).

Q. By coming around over here (indicating), you were coming across the A yard lead?

A. Yes, I crossed over on the A yard lead.

Q. Then, what tracks did you go over?

A. I walked over here (indicating), so I could get in touch with our engineer.

Q. Then did you stand near or on the A yard lead track?

A. I was standing there, yes.

Q. On this track (indicating)?

A. Yes.

Q. This switch—then you received the signals from the switch foreman, who was near number 6?

A. Yes.

Q. What did you do then, relay them to the engineer?

A. I relayed them back to our engineer.

Q. As you were standing there, before you went over [fol. 28] there, this engine had backed up on this A yard lead?

A. On the A yard lead.

Q. Then you crossed over to this point, where this area is (indicating)—where a spike is driven in the center of the track?

A. Yes.

Q. Was that substantially the point where you were when you were relaying these signals?

A. It was right in there somewhere; it was right close to there.

Q. As you were relaying these signals, this engine which had backed up—where was it with reference to the crossing, was it on the crossing, or to the east or west of it; do you remember?

A. On the crossing.

Q. Which way was the pilot facing?

A. West.

Q. The head of the engine?

A. Yes.

Q. As you stood there relaying these signals, you may state whether or not there was any headlight on that engine.

A. No headlight that I saw.

Q. Could you have seen it, if there was?

A. Yes.

Q. There was no headlight on there?

A. No.

Q. Do you know what the rule is, in the rule book, and in the practice and custom in the yards there, as to moving an engine without ringing a bell?

[fol. 29] A. They should ring the bell before they move, that is, moving out with the engine.

Q. While you were standing there, taking these signals, you were facing which way?

A. I was facing west; I was facing the foreman, to catch his signals, with my back towards this engine, on the A yard lead.

Q. Near the crossing?

A. Near the crossing.

Q. While you were standing there to get these signals, and relaying them, your back would be to that engine?

A. Yes, sir.

Q. If the headlight had been lit, the engineer could clearly have seen you, could he not?

A. He could have seen me, and he could have seen me without any headlight, for I was there with my lantern lit.

Q. He could have seen you with your lantern lit, if he had looked out that way?

A. Yes.

Q. As you were standing there, receiving and relaying these signals, you may state whether or not you met with and accident?

A. I did.

Q. What happened?

A. I lost my two feet.

Q. What happened; how did you lose your feet?

A. I was passing signals back to our engineer, and I had my back—I was watching our foreman, and was passing signals back to our engineer, and this engineer, he released [fol. 30] his brakes, and run over me, and cut my two feet off.

Q. Did you have any warning or signal of the approach of that engine——

A. None whatever.

Q. (Continiung:) —by blowing a whistle or otherwise?

A. No, sir.

Q. Were you given any opportunity to know that this engine was coming up?

A. None whatever.

Q. Do you know whether or not it is the custom and the practice in the yard, before moving an engine, under circumstances such as this, to signal the men working on the track?

A. Yes, sir.

Q. Was that custom violated when you were hurt?

A. Yes, it was.

Q. No signal was given you?

A. None at all.

Q. And no warning of the approach of this engine?

A. Not a bit.

Q. And it continued and knocked you down?

(No answer.)

Q. Did it come ahead and knock you down?

A. Yes.

Q. At the time you were working there, did you do anything that you should not have done; did you do your work all right?

A. I done my duty.

[fol. 31] Q. You were not guilty of any negligence there?

A. None whatever.

Q. You did not know that this engine was going to come ahead there, did you?

A. No, sir.

Q. You did not know that there was any risk in standing there at that time?

A. No, sir.

Q. There was no risk in standing there, if the signal had been given, was there?

A. No, sir.

By Mr. Joyce:

Q. What time of night was this, Mr. Borum?

A. It was the morning of the 11th of December, 1928.

Q. At what time?

A. At about two forty, as near as I can remember.

By Mr. Davis:

Q. As you were working there, do you know whether the grade of this A yard lead is toward the west or toward the east?

A. West.

Q. If the brake were released on the engine, do you know that it would drift down toward the west?

A. Yes, nine times out of ten, it will.

Q. Before this engine struck you, were you given any warning or notice that it was coming?

A. Not a bit.

Q. Could you hear, while you were standing there, any [fol. 32] working of the engine while it was heading toward you?

A. Our engine was working, too.

Q. You did not hear any working of the engine, as it came down upon you?

A. No; the engine would run down there itself.

Q. And just the releasing of the brakes, and opening the throttle would allow the engine to drift down to you?

A. Yes.

Q. That is the way you had your accident?

A. Yes.

By Mr. Joyce:

Q. Were there any cars connected with that engine?

A. No, there were none connected on the A yard lead at all.

Q. The engine was alone?

A. It was alone.

By Mr. Stearns:

Q. Was the engine at the crossing when you first started to give signals?

A. Yes; the engine backed up, and blocked the view; that is why I had to go down there, to pass the signals.

Q. How far was it from you at that time?

A. I should judge, around sixty or seventy feet, something like that; it was on the right-hand curve; the engineer is on the right-hand side.

By Mr. Davis:

Q. I call you attention to Rule 30, and ask you if that was one of the rules in force and effect at the time of your [fol. 33] injury? (Document submitted to the witness.)

A. Yes, sir.

Mr. Davis: We offer in evidence Rule 30, reading as follows: "The engine bell must be rung when the engine is about to move, and while approaching and passing public crossings at grade."

Mr. Joyce: Was this a public crossing?

A. No, it was just a crossing, down into the B yard.

Q. Did teams go over it?

A. Lots of teams go over it, but it is no public crossing, like a main street.

Q. Do automobiles go over it?

A. Yes.

Q. And people walk over it?

A. Yes.

Q. You say it is not a public crossing; the public use it, don't they?

A. Yes, but I mean, it is not a heavy street.

Q. It was a crossing used generally by automobiles and pedestrians and teams, crossing over it?

A. Yes.

Q. I hand you Rule 106; will you read that, and I will ask you if that was one of the rules that was in force and in effect at that time?

(Document submitted to the witness.)

A. Yes.

Mr. Davis: We offer in evidence Rule 106, reading as follows: "Both the conductor and trainmen are responsible [fol. 34] for the saftey of the train and the observance of the rules, and under conditions not provided for by the rules, must take every precaution for protection."

Q. When did you first go to work for the Soo Line Railroad?

A. In 1911.

Q. At the time that you went to work for them, what age did you give?

A. My railroad age.

Q. What do you mean by "railroad age"?
A. The age that you start in to work at.
Q. Was it the same as your actual age?
A. No.
Q. What do you mean by "railroad age"?
A. Well, as a rule, you go to work on account of the age limit. I was told before I went to work for the Soo Line, that the age limit was thirty-five years, so I went to work at my railroad age, twenty-eight, in 1911.
Q. And you worked in 1911 until what time?
A. In 1917, I think.
Q. You left the employment of the Soo Line in 1917?
A. Yes, sir.
Q. In 1921, did you again go back to apply for work, to the Soo Line Railroad?
A. Yes, sir.
Q. About what time in 1921?
A. In October.
Q. Did you go to see anybody about going to work?
A. The general yardmaster.
[fol. 35] Q. What was his name?
A. Mr. Danforth.
Q. Did you have a talk with him, about going to work for the Soo Line Railroad?
A. I did.
Q. I wish you would tell what you said to him, and what he said to you, when you applied for employment?

Mr. Palmer: I think I shall object to that, as incompetent, irrelevant and immaterial, no foundation laid for it, and hearsay.

Mr. Davis: I think it is material, gentlemen, because that is the very issue in this case, and the foundation has certainly been laid, because he had the talk, and it is not hearsay, because it is an official of the company, the official to whom he went and had this conversation with.

Mr. Stearns: Well, it is a general rule, anyway, in reference matters, or matters of reference, in all instances, that they may accept these matters and then consider only the competent testimony.

Mr. Davis: Yes, that is true. I think that is the rule.

Mr. Joyce: The objection will be overruled.

Mr. Palmer: Exception.

By Mr. Davis: You may state what you said to Mr. Danforth, and what he said to you at the time you applied for employment.

A. I met Mr. Danforth out on the platform, and I asked him if there was any chance for a job. He says, "Well, I need men, I think I can place you." He asked me about [fol. 36] my age, and I told him the age is all right.

Q. What did you say to him about the age?

Mr. Palmer: It will be understood that this is all taken subject to objection on the part of the defendant, that it is incompetent, irrelevant and immaterial, no foundation laid for it, hearsay, and no authority has been established on the part of the person with whom the plaintiff had this conversation, to make any statement or receive any communications that would be in any manner binding upon the defendant.

By Mr. Davis:

Q. Was the yardmaster the man who hired the men?

A. Yes, sir.

Q. He had charge of the yards at Shoreham?

A. Yes, sir.

Q. He had known you from 1911 to 1917, when you worked during that time?

A. Yes, sir.

Mr. Palmer: I object to the answer of the witness that the yardmaster was the man who hired the men. I would like to have that answer stricken out, and objection was made, that there is no foundation for it, and the witness has not shown himself competent to testify.

By Mr. Davis: Do you know who hired the men at Shoreham?

A. Mr. Danforth hired me.

Q. Do you know who hired other men there?

A. No one but Mr. Danforth that I know of.

[fol. 37] Q. And when you went there to apply for work, to whom did you apply?

A. I applied to Mr. Danforth.

Q. The yardmaster at Shoreham?

A. Yes, sir.

Q. What did you say to him, and what did he say to you about your age?

A. He says, "How about your age"? and I told him, "My age is all right."

Q. What did you say to him; did you say what your age was, or what did you say?

Mr. Palmer: That is objected to as leading and suggestive.

Mr. Joyce: I think he ought to state the facts.

By Mr. Davis: Just state what you said to him about your age.

Mr. Palmer: What was the last answer of the witness?

(Previous answer read.)

By Mr. Davis: What else did you say, if anything about your age?

A. I told him my age limit, my railroad age is thirty-nine.

Q. Did you say anything else to him?

A. I told him that I was eleven years under my real age.

Q. What did Mr. Danforth say to you?

A. He said, "I will give you a slip—I will go down and see what I can do."

Q. Did he hire you that day?

A. No.

Q. Did he say what he was going to do?

[fol. 38] A. He said he would go down and see the superintendent.

Q. Did you come back and see him later?

A. I did.

Q. And did you have a talk with him?

A. Yes.

Q. What did you say to him and what did he say to you?

Mr. Palmer: That is objected to as hearsay, no foundation laid for it, incompetent, irrelevant and immaterial.

Mr. Joyce: I think all this class of testimony might go in subject to your objection, Mr. Palmer, and you may preserve your objection. A lot of these questions are preliminary, anyway.

Mr Palmer: It will be taken subject to the objection that has been made?

Mr. Joyce: Yes.

Mr. Palmer: Exception will be allowed us?

Mr Joyce: Yes, on all of this character of testimony.

Q. What did you say to him and what did he say to you when you went back the next time to see Mr. Danforth?

A. I says, "How is the chance now to work?" He says "All right," and he gives me a slip, and I took it down to the clerk.

Q. Where was that clerk?

A. At the general office.

Q. That was in the Soo Line's office building?

A. Yes.

Q. Did you take that slip to the clerk?

[fol. 39] A. Yes, I did.

Q. And what did you say to him, and what did he say to you?

Mr. Palmer: That is objected to as incompetent, irrelevant and immaterial, no foundation laid for it, and no showing of any authority on the part of this clerk, to make any statement which would be in any way binding upon the defendant, and as hearsay.

Mr. Joyce: Can you clear up, Mr. Davis, about this clerk's authority, and who he was?

Mr. Davis: Yes, I expect to; we will follow it up, and I think the clerk will testify that it is his duty to accept and receive applications, and also that it is his duty, under certain rules of the working agreement, to check up these applications after they are received, and to ascertain within thirty days as to their correctness, and that after the thirty days went by, that the man's job, under the working agreement, cannot be disturbed, regardless of any statement made in that application.

Mr. Joyce: You do not undertake to show that, do you?

Mr. Davis: Yes, we will show that.

Q. What did you say to the clerk, and what did he say to you?

A. I gave him the slip.

Mr. Palmer: It will be understood that this testimony is taken subject to objection and exception on the part of the defendant.

Mr. Joyce: Yes.

Q. Go ahead.

[fol. 40] A. I gave him the slip, and filed an application as switchman. He got out a lot of papers, he asked what my age was, and I told him, "My railroad age was thirty-nine," and he says, "I think you are too old," and he sent me down to the superintendent.

Q. Did you go to see the superintendent.

A. I went to see the superintendent.

Q. Did you tell the superintendent that you were making application for work?

A. I did.

Q. What occurred there?

A. I told the superintendent——

Mr. Palmer (interrupting): The same objection is made to that. It will be understood that it is taken subject to our objection and exception.

Mr. Joyce: Yes.

Q. Just tell what talk you had with the superintendent.

A. I told the superintendent what I was there for, that I filled out an application for switchman, and I told him that the clerk told me that he thought I was too old, and he asked me my age, and I told him my railroad age was thirty-nine, and he said, "We need men," and he told me to go back up and fill out the application.

Q. Did you go back to the clerk?

A. I went back to the clerk.

Q. Did you fill out the application?

A. I did.

Q. Did you have a talk with the clerk when you filled out the application?

[fol. 41] A. Yes, I told him the superintendent sent me back.

Q. What did he say to you about filling out the application—the clerk?

A He said, "Just fill it out as near as you can, like you did the first one."

Q. Did you fill it out?

A. Yes.

Q. Did you give your railroad age as 1883?

A. Yes.

Q. The date of your birth was 1883?

A. Yes, sir.

Q. After the application was filled out, were you sent to anybody for examination?

A. To Dr. Rishmiller.

Q. Had he examined you prior to that time, in 1911?

A. Yes, sir.

Q. When you were examined by Dr. Rishmiller, did you go there yourself?

A. I did.

Q. You sent no one for you, to substitute for you?

A. No, sir.

Q. You gave you true name as James M. Borum?

A. Yes, sir.

Q. That is the only name you were working under with the Soo Line?

A. That is the only name that I ever used in my life.

[fol. 42] Q. You never attempted to send a substitute, to be examined for you?

A. No, sir.

Q. And you were examined by Dr. Rishmiller?

A. Yes, sir.

Q. In that examination, I will ask you to state whether you were stripped?

A. I was stripped of everything.

Q. What kind of an examination was made?

A. A thorough examination.

Q. Did he examine your eyes, and the different parts of your body?

A. The eyes, hearing and everything.

Q. He tested your eyesight?

A. Yes, sir.

Q. He tested your hearing?

A. Yes, sir.

Q. He made a thorough examination?

A. A thorough examination.

Q. After that, did you go to work for the Soo Road?

A. I did.

Q. Before this injury, at the time you were hurt, was your hearing good?

A. Yes, sir.

Q. Was your eyesight good?

A. Yes, sir.

Q. With reference to the doing of the work, were you able-bodied at that time?

A. Yes, sir.

Q. Was there any infirmity that prevented you from [fol. 43] doing your work as well as you did twenty years before?

A. Not a bit.

Q. Could you climb cars, and set brakes, and climb about with as much agility as you did twenty years ago?

A. Yes, sir.

Mr. Palmer: That is objected to as calling for a mere conclusion of the witness, not a statement of fact.

Q. With reference to the condition of your health, what was that?

A. Good.

Q. With reference to your ability to move around, what was your condition in that regard, before the injury?

A. It was good.

Q. What was your condition as to your moving around, as to your eyesight, and your hearing, just before the injury, as compared with what it was fifteen years before?

A. Exactly.

Q. What do you mean by "exactly"?

A. Just the same as it was fifteen or twenty years ago.

Q. Could you move about as well as you could fifteen or twenty years before?

A. I was just as supple as any young man they got over there now.

Q. At the time they told you they needed men to work there, was there considerable work in the Shoreham Yards? [fol. 44] A. Yes.

Q. Did you work quite regularly then for a while?

A. Yes, sir.

Q. As switchman?

A. As switchman.

Q. That was in 1921?

A. Yes, sir.

Q. Did you continue to work with the Soo Railroad from 1921 up until the time of your injury?

A. Yes, sir.

Q. Did you work for any other railroad?

A. Not in that time.

Q. With reference to the summer months—or the winter months, would there be times when you would not be working?

A. There were times when it was slack, when we were not doing anything.

Q. With reference to the months of October and November, in the fall of the year, do you know whether the yards would be congested with cars?

A. Yes, sir.

Q. Were they generally?

A. Yes, sir.

Q. Did that require more men?

A. Yes, sir.

Q. During all the time from 1921 up to 1928, you worked regular there whenever you were called upon, did you?

A. Yes, sir. Of course, I worked extra there for quite a while, but I was holding down a steady job when I got hurt.

[fol. 45] Q. Were you working there as a switchman?

A. Yes, sir.

Q. Do you know, from your working there as a switchman, whether you work under a certain agreement and schedule with the train organization?

A. Yes, sir.

Q. And, calling your attention to article XXII, in roman numerals, on page 45, of the book that I hand you, you may state whether or not that was one of the rules and agreements that you were working under with the Soo Railroad Company?

A. Yes, sir.

Mr. Davis: We offer in evidence article XXII, reading as follows: "This is the schedule for trainmen and yardmen"; article XXII read as follows:

"Applications for employment in yard service not rejected in thirty (30) days will be considered accepted."

Q. Did the fact that you were actually older have anything to do with your injury?

A. Not a bit.

Mr. Palmer: Just a minute. That is objected to as very leading and suggestive.

Mr. Joyce: We can take it subject to your objection.

Q. This schedule for trainmen and yardmen, which I have read, rule XXII, is an agreement made and signed by the general chairman of the Soo Railroad, and the brotherhood organizations of the railroad, the Brotherhood of Railroad [fol. 46] Trainmen, O. R. C., and applies to the railroad switchmen?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Mr. Joyce: Was this agreement in effect at the time that you were injured?

Mr. Davis: This was effective March 1, 1921, and we will offer the first page in evidence.

Mr. Palmer: It may be admitted that it was effective at the time of his injury, and during both times of the employment of the plaintiff.

Mr. Davis: I don't know about 1911, whether it was the same or not; I have not seen one. This is 1921, and that superseded the schedule of 1917 but at the time of his injury this schedule was in force and effect.

Mr. Palmer: Yes, and it may be admitted that it was in force at the time of his employment in the service that he was in at the time of his injury.

Mr. Davis: Yes.

Mr. Palmer: If he was an employe in the beginning under the Federal Liability Act.

Mr. Joyce: Before you leave this subject, will you fix the date in 1921, when these various conferences took place with the officials and employes of the Soo Railroad, and the time that elapsed between the various ones, perhaps you can fix the time.

Q. Do you have the exact date in October, 1921, on which you went to work?

[fol. 47] A. October 23rd, I think it was, or 24th, something like that.

Q. In 1921?

A. In 1921.

Q. How long before that can you give the arbitrators an idea as to about how many days before, that you had your first talk in October, 1921, with the yardmaster, about going to work?

A. That must have been three or four days, something like that, as near as I can remember.

Q. From three to four days before you went to work?

A. Yes, sir.

Q. You testified regarding going to see the superintendent, and filling out an application blank; was that the same day that you talked to the yardmaster at Shoreham?

A. That was the second time.

Q. How many days was that before you went to work, if you can give some idea?

A. It seems like I went to work on the 28th of October.

Q. You had this talk with the yardmaster, when he gave you a slip for the clerk?

A. Yes.

Q. You went to see the clerk?

A. Yes, sir.

Q. Then you went to see the superintendent?

A. Yes, sir.

Q. Then you came back, and filled an application out with the clerk?

A. Yes, sir.

[fol. 48] Q. Did you go that same day, or the next day, to see Dr. Rishmiller?

A. I went the same day that I made out the application.

Q. You were examined that same day?

A. That same day.

Q. When did you go to work?

A. The next day following that.

Q. With reference to the yardmaster, Mr. Danforth, did you know him in 1911, when you went to work?

A. Yes, sir.

Q. You had known him during that time up to 1917?

A. During the time from 1911 up to the present time.

Q. He had known you during that time, and visited with you?

A. Yes, sir.

Q. Did you see him, and work under him, from 1921 to 1928, at the time of your injury?

A. Yes, sir.

Q. Your relations with him were always friendly?

A. Always.

Q. He was intimately acquainted with you?

A. Yes, sir.

Q. You visited with him at various times?

A. Yes, sir.

Q. With reference to your hair in 1921, what was the condition of your hair when you were examined by Dr. Rishmiller?

[fol. 49] A. My hair was brown, but I had a little white hair on my head.

Q. When Dr. Rishmiller examined you, as to your physical condition, did he say anything to you as to your condition, as to going to work?

A. My condition was all right.

Q. He told you that, did he?

A. Yes, sir.

Q. You went to work?

A. Yes, sir.

Q. You continued from 1921 until 1928, when you were injured, to work for the Soo Railroad.

A. Yes, sir.

Q. During any time, was any complaint made, after you went to work, as to your being unable to do that work?

A. Not that I had ever heard of.

Q. Were you ever called in for failure to do your work, or not doing your work properly?

A. No, sir.

Q. Was there ever any question raised as to your age, or your capacity to work, after you went to work?

A. No, sir.

By Mr. Stearns:

Q. Did you continue in the employ of the railroad company, from that time up to the time you were injured, as a switchman?

A. Yes, sir.

Q. That is the only work you did?

A. Yes, sir, when there was work.

By Mr. Joyce:

[fol. 50] Q. Mr. Borum, first, what was the date of your actual birth—the date of your birthday, if you know?

A. The 20th of October.

Q. What year?

A. 1872.

Q. At the time that you were sent to the superintendent—I am not quite clear as to what took place there, and I don't want to have anything to assume—I would like to know if there was anything more said to you by him?

A. No, sir.

Q. He just told you to go back upstairs and that they needed men?

A. You mean, in 1911?

Q. No, no, in 1921.

Mr. Davis: That was the yardmaster or the superintendent?

By Mr. Joyce:

Q. Wasn't that in 1921, that you went to the superintendent?

A. Yes.

Q. On that occasion, what did you say to him, and what did he say to you?

A. I went down there, and I told him that I was coming here, for filing an application for switchman, and the chief clerk sent me down there; that he said, he thought I was too old. I told the superintendent that I came down there to file an application, and that the clerk thought that I was too old, and he asked me what my age was, and I told him my railroad age was thirty-nine.

[fol. 51] Q. Did he ask you what your actual age was?

A. No; that is about all that was said. He said, "Go back and fill out your application."

Q. Did he give you any slip, as you mentioned, to give back to the clerk?

A. I don't remember; I think he gave me a slip to take back up to the clerk, and I took that and went back up to the clerk and filed the application.

By Mr. Davis:

Q. Now, in reference to the term "railroad age," what do you mean by "railroad age"?

A. Well, it is a habit—it has always been the custom, and we all know it; a man hardly ever goes to work on his right age, with the railroad.

Q. Why not?

A. On account of the age limit.

Q. What do you mean by "age limit"?

A. Well, the age limit, you know—if you get so old, why, you cannot put in no application; they won't hire you.

Q. Do you know, from your experience on the Soo Line, that other workmen would work under different ages?

A. Oh, yes.

Mr. Palmer: That is objected to as entirely immaterial.

Mr. Davis: I think that goes to the knowledge of the company.

Mr. Joyce: I don't see what bearing it would have on this particular matter. You can preserve your objection and exception.

Mr. Davis: You may state, whether you know, from your [fol. 52] work with the Soo Line, whether it was the practice there to work under the railroad age.

Mr. Palmer: That is objected to as entirely immaterial. It necessarily is based on pure hearsay, and is in no manner binding upon the defendant here, and I wish the testimony, if it is received, that it be understood to be received subject to our objection and exception.

Mr. Davis: It is that—it is generally understood under the rule, as I understand, that all that evidence is taken subject to objection, in arbitration matters.

Mr. Joyce: I have thought about it, and I think it is the thought of the other arbitrators, that we ought to hear all the testimony that there is, and if there is immaterial and irrelevant testimony that it will be discarded. Of course, you can save your objection, if you have to.

Mr. Palmer: Just so that is understood; I don't want to interrupt all the time.

By Mr. Davis:

Q. Mr. Borum, I will ask you again with reference to the railroad age; do you know what that term means with reference to railroad men working in the yards as switchmen or otherwise?

A. It is common all over the country.

Q. You mean, in the yards at Shoreham?
A. Yes.
Q. Did you know of other men who worked there——
A. I do.
[fol. 53] Q. (Continuing:) —that gave their age as older —do you know of other men that worked in the yards at Shoreham who gave their age either as younger or older than they were?

Mr. Palmer: That is objected to as pure hearsay. The witness has not shown himself competent to testify, and is in no manner binding upon the defendant.

Mr. Joyce: Cannot your objection go to all of this testimony, you have made your objection to it?

By Mr. Davis:

Q. Do you know of other men who work there?
A. I do.
Q. In talking with the yardmaster, did you ever talk, in addition to this time—with him about men that were older, if you know?

Mr. Palmer: That is objected to as entirely immaterial and hearsay.

Q. As to whether he knew.

Mr. Joyce: He may answer:

A. I never talked to him about any men being old.

Mr. Joyce: Is there an age limit, Mr. Bornum, that controls the employment of switchmen, as far as you know?
A. Forty-five years, on the Soo Line, the way I understand it.

By Mr. Davis:

Q. There is one other question that I want to ask: In 1911, when you made application, had you been told or informed what the age limit was supposed to be then?
[fol. 54] A. I was informed it was thirty-five years then.
Q. You did not know that, from any rules of the company?
A. No, no.
Q. And you were thirty-nine, I believe?

A. Yes, sir.
Q. In 1911?
A. Yes, sir.

By Mr. Stearns:

Q. You real age in 1921 was forty-nine?
A. Sir?
Q. Your real age in 1921 was forty-nine.
A. Yes.

Mr. Devaney: You will be fifty-seven years of age this October 20th?
A. The 20th of this month.

By Mr. Joyce:

Q. As a mattter of fact, how old were you in 1921 when you went to work?
A. How?
Q. What was your actual age when you went to work in 1921?
A. The date of my birth?
Q. Yes.
A. Thirty-nine.
Q. Your actual age?
A. Oh, the real age?
Q. Your real age.
A. (Witness figuring.) Forty-nine.

[fol. 55] Cross-examination.

By Mr. Palmer:

Q. You state that our full name is James Monroe Borum?
A. Yes, sir.
Q. Where were you born?
A. I was born in Illinois.
Q. What place in Illinois?
A. In Scott county.
Q. What is the true date of your birth?
A. October 20, 1872.
Q. October 20, 1872?
A. Yes, sir.
Q. So you were twenty-one on October 20, 1893?
A. Yes, sir.

Q. At least ever since you were twenty-one, you have known that the true date of your birth is October 20, 1872, have you not?

A. Yes, sir.

Q. You state that you first made application for employment with the defendant company in 1911, that is right, is it?

A. Yes, sir.

Q. Was that November 7, 1911?

A. I don't remember the date, or the day of the month, but it was in November, I know.

Q. At that time you understood and had been advised that the defendant company had a rule that no one would be taken into the service over the age of thirty-five years, did you not?

A. Yes, sir.

[fol. 56] Q. Was the application that you made in writing?

A. Yes, sir.

Q. Did you fill out the usual application blank for employment which was in use by the defendant company?

A. I did.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 1.

(Document marked Defendant's Exhibit 1 for identification by the reporter.)

Q. That employment application you filled out was not to Mr. Danforth, was it?

A. No.

Q. It was to the employment officer of the company?

A. Yes, sir, as near as I can remember.

Q. At that time, that was Mr. Schutt?

A. Yes, Mr. Schutt.

Mr. Davis: That was in 1911?

Mr. Palmer: In 1911.

By Mr. Palmer:

Q. That was in the uptown offices, the main offices of the defendant company?

A. Yes, sir.

Q. I call your attention to this Defendant's Exhibit 1, and I will ask you if that is the application you filled out at that time, that is, in 1911, under your first employment?

(Document submitted to the witness.)

A. Yes, I filled that out.

Q. Upon this Defendant's Exhibit 1, the first line being [fol. 57] the blank "Application for Employment as" in print; and then the word "Switchman" in writing. Did you write that word "Switchman" there (indicating)?

A. Yes, that is all in my writing.

Q. Under item 1, in that blank, I find the printed words "Name in full"; and then in handwriting "James Monroe Borum." You wrote that, didn't you?

A. Yes, sir.

Q. On the same line the printed word "Nationality," and the written word "American"; you wrote that, didn't you?

A. Yes, sir.

Q. Under item 2, I find the printed word "Age," and a blank, and then the printed word "Years," and between the two in pen and ink the figures "28." You wrote that, didn't you?

A. Yes, sir.

Q. And following that, the printed words "Date of Birth," and then in handwriting, "October 20, 1883." You wrote that, didn't you?

A. That is my writing.

Q. That is followed by the printed words, "Place of Birth," and then by the written words, "Scott Co., Ill." You wrote, that, didn't you?

A. Yes, sir.

Q. Without going through it in detail, you wrote all of the matter that appears on this blank in pen and ink, didn't you?

A. That is in my writing, yes.

Q. And then you signed it at the end, at the second page. [fol. 58] "James Monroe Borum," did you?

A. Yes, sir.

Q. And you gave your address as "1019 28 Ave. N. E., Minneapolis, Minn."; that is correct, isn't it?

A. Yes, sir.

Q. And you will notice at the bottom of the second page here (indicating), is the date, "November 7, 1911."

A. Yes, sir.

Q. In your best judgment, is that the date on which you filled out this application for employment?

A. Yes, sir.

Q. When you wrote under item number 2 here (indicating), Mr. Borum, "Age 28 years," you intended that the company should believe that you were twenty-eight years old, didn't you?

A. Yes, sir.

Q. And when you wrote the words here after "Date of Birth"—"October 20, 1883," you intended that the company should believe that you were born on the 20th day of October, 1883, didn't you?

A. Well——

Q. (Interrupting.) Just answer that question "Yes" or "No," please.

A. Yes; that is my writing; I did not intend to make the railroad company believe that; that is my railroad age; I did not intend to make the company believe that at all; that is my railroad age.

Q. You mean that your railroad age is something entirely different from your actual age?

A. Eleven years difference.

[fol. 59] Q. There is eleven years difference between your railroad age and your true age?

A. That is my railroad age; and the age limit would be thirty-five on the Soo Line at that time.

Q. And you knew that?

A. That is what I was informed, that my age limit was thirty-five. I did not try to misinform the Soo Line at all about that; that has always been the practice, with a lot of them, putting down their ages.

Q. That is the only age you ever gave them at any time——

A. Yes.

Q. (Continuing:) —of your birth?

A. Yes, that is my railroad age.

Q. You never gave them any different date as the date of your birth, did you?

A. Not that I remember of; no sir. That is my railroad age right there (indicating).

Q. You never at any time, up to the time you got hurt, gave the defendant company any different date of your birth than this October 20, 1883, did you?

A. Not that I remember of.

Q. You would remember it if you had, wouldn't you?

A. I think I would.

Q. When you wrote that there (indicating), and left it there on file with the defendant company, you intended that they should believe that that was the true date of your birth?

A. No, I did not.

[fol. 60] Q. What did you intend that they should believe?

A. To believe it is my railroad actual age—my age in the railroad, as it is a practice of all of the employees—not all of them, but the majority of the railroad employees, to cut their age down.

Q. You did that because others were doing it, is that it?

A. Yes, sir, to get by on the age limit.

Q. You knew it was not true?

A. That was my railroad age.

Q. Answer that question "Yes" or "No"; you knew it was not true, didn't you?

A. I knew it was not my actual age, no; it was my railroad age.

Mr. Palmer: We offer this Defendant's Exhibit 1 in evidence.

(Document submitted to Mr. Davis.)

Mr. Davis: One or two questions.

By Mr. Davis:

Q. Mr. Borum, you state here that the place of your birth was Scott county, Illinois; was that correct?

A. That is what I was told.

Q. You stated the name of your father and mother, or nearest relative, and you gave "Miss Della Borum" and "Mrs. Fanna B. Patient," and their resident- as "527 17th St., Rock Island, Ill.," under item 4; was that correct?

A. Yes, sir.

Mr. Davis: No objection.

By Mr. Palmer:

[fol. 61] Q. At the time you made this application, Defendant's Exhibit 1, at the general offices of the defendant

company, those general offices were in what was called the Transportation Building?

A. I think so, yes.

Q. That is right, isn't it?

A. Yes.

Q. At 317 Second avenue south?

No answer.

Q. Then you went from there over to the office of the chief examining surgeon of the defendant company, did you not?

A. Yes, sir.

Q. That is, after you had filled out this application, Defendant's Exhibit 1?

A. Yes, sir.

Q. That was a couple of blocks away, wasn't it?

A. A couple or three blocks, something like that.

Q. You say you were examined by Dr. Rishmiller?

A. Yes, sir.

Q. He was the chief examining surgeon for the defendant company at both times when you made application, wasn't he?

A. Yes, sir.

Q. Did you make a statement to Dr. Rishmiller, of your age and date of birth?

A. I don't remember whether I did or not; I don't think I did.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 2.

[fol. 62] (Document marked Defendant's Exhibit 2 for identification by the reporter.)

Q. Calling your attention to this Defendant's Exhibit 2 I will ask you if that is the statement which you made to Dr. Rishmiller, in connection with the application, Defendant's Exhibit 1?

(Document submitted to the witness.)

A. It is, yes.

Q. That first page is all in your handwriting, isn't it?

A. Yes, sir.

Q. And that is dated November 7, 1911?

A. Yes, sir.

Q. And is that the time you filled that out?

A. As near as I can remember, it is, Mr. Palmer, yes.

Q. Now, then, I notice the heading reads: "Applicant's Statement of His Physical Condition," and after item 1, the printed word "Name," follows the written words "James Monroe Borum"; you wrote that, did you?

A. Yes, sir.

Q. Then the printed words "Proposed Occupation," and the written word "Switchman"; you wrote the word "Switchman," did you?

A. Yes, sir.

Q. Then "Present Address" printed, and in writing you have "1019 28 Ave. N. E. Mpls.," you wrote that, did you?

A. Yes, sir

Q. Then the printed words "Date of Birth," and in the blank for that, the written words "Oct. 20, 1883"; you [fol. 63] wrote that, didn't you?

A. Yes, sir.

Q. You wrote that there as the date of your birth?

A. My railroad birth.

Q. Just answer the question.

A. My railroad age.

Q. When you wrote that there, you intended that Dr. Rishmiller should understand and believe that the date of your birth was October 20, 1883, didn't you?

A. No; that is my railroad age, right there (indicating) —1883. That is not my actual age.

Q. It is eleven years younger than your actual age, isn't it?

A. Yes, sir.

Q. You knew that Dr. Rishmiller would not pass you if you stated your true age, didn't you?

A. No, I did not know that; I did not know what he would do.

Q. You knew that your application would not be accepted if you stated your true age, didn't you, Mr. Borum?

A. It would not be accepted, if I got turned down, no.

Q. As a matter of fact, your actual age at that time was thirty-nine years and seventeen days?

A. Yes, sir.

Q. But, according to your date of birth which you gave, your actual age was twenty-eight—I mean, your age according to your date of birth which you gave, your age

[fol. 64] appeared to be twenty-eight years and seventeen days; that is right, isn't it?

A. Yes, sir.

Q. That is what you intended to convey to the company?

A. No; the date of my railroad age; that was my railroad age that I was working under.

Q. In other words, you were actually in your fortieth year, and by giving this date of your birth, as October 20, 1883, you made it appear that you were in your twenty-ninth year; that is right, isn't it?

A. My railroad appearance, yes.

Q. Your railroad appearance on this (indicating), is that your answer?

A. Yes, sir.

Q. You knew that you would not be accepted if you were in your fortieth year, didn't you?

A. No, I did not know it.

Q. You knew they did not hire any men over thirty-five, you say?

A. Yes, thirty-five, but I did not know it.

Q. But you did not know—what?

A. I did not know but what I would be accepted; I did not know.

Q. Why did you give your age as eleven years younger than you were then?

A. I was afraid of this age limit of thirty-five years—getting work there for a few years, and then getting thrown out, and then I would not have any job anywhere else—my age limit.

[fol. 65] Q. Then you did it because you were afraid of that age limit?

A. I was afraid of it, yes.

Mr. Palmer: We offer Defendant's Exhibit 2 in evidence.

Mr. Davis: No objection.

By Mr. Palmer:

Q. Now, after you made this first application in 1911, you had to take a written examination, did you not?

A. Yes, sir.

Q. And that was the following spring?

A. Yes, sir.

Q. In April, 1912; that is right, isn't it?

A. I think it was along in there.
Q. Or about that time?
A. I think so, yes.
Q. That examination was in writing, was it?
A. Yes, sir; you mean on the book of rules?
Q. Yes, I mean on the operating rules.
A. Yes.
Q. That is correct, is it?
A. Yes, sir.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 3.

(Document marked Defendant's Exhibit 3 for identification by the reporter.)

Q. I call your attention to this Defendant's Exhibit 3, and I will ask you if that is the examination which you took at that time?

(Document submitted to the witness.)

A. Yes, sir.
[fol. 66] Q. And that states on the outside, the "Date of Examination—April 13, 1912"; is that the correct date on which you took that examination?
A. I guess it is, yes.
Q. On the outside of this exhibit, after the printed words "Name (in full)," "James Monroe Borum," did you write that?
A. I did.
Q. After the word "Occupation," the word "Switchman"; did you write that word?
A. Yes, sir.
Q. The printed words "Division or District," and the written word "Wisconsin"; you wrote that, did you?
A. Yes, sir.
Q. The printed words "Date of Examination," and the written words "April 13, 1912"; you wrote that, did you?
A. Yes, sir.
Q. On the inside of that same page, I find some other printed matters and blanks filled in—"Give your name in full," on the first line, and then the written words "James Monroe Borum"; you wrote that, did you?
A. Yes, sir.

Q. On the second line, the printed words "Date of birth," and then the written words "October 20, 1883"; you wrote that, didn't you?

A. Yes, sir.

Q. Then the printed words "Place of birth," and after that the written words "Scott Co., Illinois"; you wrote that, did you?

[fol. 67] A. Yes, sir.

Q. And the rest of the blanks on that page——

A. (Interrupting.) Yes, sir.

Q. (Continuing): —you filled out in your own handwriting?

A. Yes, sir.

Q. In this Exhibit 3 you wrote your date of birth as October 20, 1883; what did you do that for?

A. On account of the age limit, I told you.

Q. You were afraid of the age limit?

A. Yes, sir.

Q. You did not dare tell the company your right age, did you?

(No answer.)

Q. Is that right, Mr. Borum?

A. I did not dare to tell them anything like that, you know, but that is my railroad age limit—my railroad age, in 1883; that has always been customary.

Q. You did not dare to tell them your right age, — you?

A. Not if I wanted a job.

Mr. Palmer: We offer just the outside page; that is all that is material, in this Defendant's Exhibit 3.

(Document submitted to Mr. Davis.)

Mr. Davis: No objection.

By Mr. Palmer:

Q. With respect to Defendant's Exhibit 3, your actual age at that time, April 13, 1912, was about thirty-nine years and a half, wasn't it?

[fol. 68] A. Yes, sir.

Q. The age you gave was twenty-eight years and a half; that is right, isn't it?

A. Yes, sir.

Q. You continued in the employ of the company, you say, until 1917?

A. Nineteen seventeen, yes.
Q. That was in March?
A. March 3rd, I guess—it was something like that.
Q. March 3rd?
A. I think that was the time; I am not sure about the date.
Q. Were you discharged then?
A. No, I resigned.
Q. To be frank about it, you were found violating the liquor rule, and given a chance to resign; isn't that so, Mr. Borum?

Mr. Davis: That is objected to as immaterial, not involved in any issue in this case.
Mr. Palmer: I just wanted to show the complete, final discharge; that is the only purpose of it.
Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, not having anything to do with the issues in this case.
Mr. Palmer: I think it is a material question.
Mr. Joyce: The objection will be overruled, and your objection will be preserved.

(Previous question read.)

By Mr. Palmer:

Q. Mr. Borum, just answer that question yes or no.
[fol. 69] A. Do you want me to answer it?
Q. Yes.
A. Yes.
Q. You did resign?
A. I resigned; yes, sir.
Q. You remained entirely out of the service of the defendant company until late in October, 1921?
A. Yes, sir.
Q. About four years and a half, wasn't it?
A. Yes, sir.
Q. You say you again applied for employment in 1921?
A. Yes, sir.
Q. On October 28th, was it not?
A. Right in there somewhere, yes.
Q. That was an entirely new employment, was it not?
A. For me?

Q. Yes, with the defendant company?
A. No.
Q. Wasn't it a new employment entirely?
A. A new employment, yes—that is October 28, 1921.
Q. It was a new hiring?
A. Yes.
Q. I don't mean to say that the work of switchman was new to you; I mean that the hiring was new; you understand that now, do you?
A. Yes, sir.
Q. At that time did you fill out the regular employment blank?
A. Yes, sir.
[fol. 70] Q. The same as you had before?
A. Yes, sir.
Q. Did you do that at the general offices uptown?
A. Yes, sir.
Q. That was in the First National-Soo Line Building, in the new building?
A. Yes, sir.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 4.

(Document marked Defendant's Exhibit 4 for identification by the reporter.)

Q. I call your attention to this Defendant's Exhibit 4, and I will ask you if that is the application which you filled out at that time, in October, 1921?

(Document submitted to the witness.)

A. Yes, sir.
Q. You will observe the date there, "October 28, 1921"; do you think that is correct?
A. Yes, sir.
Q. In the first blank here appears your written name, "James Monroe Borum"; you wrote that, did you?
A. Yes, sir.
Q. And under the second item, "employment desired," the written word, "switchman"; you wrote the word "switchman," didn't you?
A. Yes, sir.
Q. And under Item 3, "age," the figures "39"; you wrote those figures, did you?

A. Yes, sir.

Q. And under Item 4, "date of birth," the written words, [fol. 71] "Oct. 20, 1883"; you wrote that, did you?

A. Yes, sir.

Q. As the place of birth, "Scott Co., Ill."; you wrote that, did you?

A. Yes, sir.

Q. All of the portions appearing there in handwriting are in your handwriting, are they?

A. Yes, sir.

Q. You signed it here at the end, didn't you, "James Monroe Borum"?

A. Yes, sir.

Q. At that time you understood, or had been advised that there was an age limit, on experienced men, of forty-five years, did you not?

A. I did, at that time.

Q. You were then an experienced switchman?

A. I have been for a good many years.

Q. But whatever your experience was, you knew that the company had a rule that no person over the age of forty-five could be taken into the service, didn't you?

A. I did not get it from headquarters; I was told by other switchmen or railroad men; I never got that from headquarters.

Q. Your actual age, at the time of making this second application, this Defendant's Exhibit 4, on October 28, 1921, was forty-nine years and eight days?

A. Yes, sir.

Q. You were in your fiftieth year?

[fol. 72] A. That was my actual age, but not my railroad age.

Q. But as you wrote down your date of birth on this application, you made it appear that you were only thirty-eight years and eight days old; that is right, isn't it?

A. Yes, that is my railroad age there (indicating).

Q. That you were in your thirty-ninth year instead of in your fiftieth year; that is the way you made it appear, didn't you?

A. Yes, my railroad age, yes.

Q. That is the way you made it appear?

A. Yes, that is my railroad age right there (indicating).

Q. What you mean by that is, that that is what you were telling the railroad?

A. Yes, that is my railroad age.

Q. You did that because you were afraid of the age limit, didn't you?

A. I done that to get the job.

Q. You knew that if you told them that you were in your fiftieth year, that you would not be taken into the service, didn't you?

A. No, I did not know that, no.

Q. You suspected that?

A. They were liable to hire me over the age limit, which they have done.

Q. If they knew they were over the age limit?

A. It has been done——

Q. (Interrupting.) It has been done?

A. No, I don't say that.

[fol. 73] Q. For thirty days, you mean?

A. For thirty days, yes, until they found out different.

Mr. Palmer: I offer in evidence Defendant's Exhibit 4.

(Document submitted to Mr. Davis.)

Mr. Davis: No objection.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 5.

(Document marked Defendant's Exhibit 5 for identification by the reporter.)

Q. After you filled out this application, Defendant's Exhibit 4, on October 28, 1921, you went over to Dr. Rishmiller again, didn't you?

A. Yes, sir.

Q. You understood that he was the chief examining surgeon for the company, didn't you?

A. Yes, sir.

Q. Did you fill out a statement of your physical condition for Dr. Rishmiller?

A. Yes, I must have.

Q. I call your attention to this Defendant's Exhibit 5, and I will ask you if that is the statement that you filled out at that time?

(Document submitted to the witness.)

A. Yes, sir.

Q. The first page of it, the written portions, are all in your handwriting are they not?

A. Yes, sir.

Q. Calling your particular attention, under item 1 here (indicating), after the word "Name," the written words [fol. 74] "James Monroe Borum," you wrote that, didn't you?

A. Yes, sir.

Q. After the printed words "Proposed Occupation," the written word "Switchman," you wrote that, didn't you?

A. Yes, sir.

Q. After the words "Present Address," the written words "2830 Polk St. N. E. Mpls," you wrote that, didn't you?

A. Yes, sir.

Q. After the printed words "Date of birth," in that blank there (indicating), the written words "October 20, 1883," you wrote that, didn't you?

A. Yes, sir.

Q. Why did you write that to Dr. Rishmiller?

A. That is my railroad age there; that is my age on the railroad.

Q. You knew, didn't you, that if Dr. Rishmiller knew that you were in your fiftieth year, that he would turn you down?

A. No, I did not know it; right down in the bottom of my heart I did not know that he would or not.

Q. You suspected that he would, didn't you?

A. No, I did not suspect anything of the kind. That is my railroad age right there (indicating).

Q. You intended that Dr. Rishmiller should understand and believe that you were only thirty-nine years of age, didn't you?

A. Yes; that is my railroad age right there (indicating).

Q. Or thirty-eight years of age, I should say—thirty-[fol. 75] eight years of age; your answer is "Yes, that is my railroad age?"

A. Yes, that is my railroad age, yes, sir.

Mr. Palmer: We offer Defendant's Exhibit 5 in evidence.

Mr. Davis: No objection.

By Mr. Palmer:

Q. After you began working under this second employment you had to take an examination on the operating rules, did you not?

A. Yes, sir.

Q. And that was sometime in March, 1926?

A. I don't remember just when it was; I had to write it, I know.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 6.

(Document marked Defendant's Exhibit 6 for identification by the reporter.)

Q. I call your attention to this Defendant's Exhibit 6, and I will ask you if that is the written examination that you took in 1926?

A. Yes, that is the examination, yes, sir.

Q. On the outside page here (indicating), the name and the occupation and the date, is that in your handwriting?

A. Yes, sir.

Q. The date of examination, "March 22nd, 1926?"

A. This is in my handwriting (indicating). Not this down here (indicating).

Q. Just the "James M. Borum," and "Switchman"; that is all that is in your handwriting?

[fol. 76] A. Yes, sir.

Q. "March 22nd, 1926," on the outside, is not in your handwriting?

A. Yes, that here (indicating).

Q. I mean the "Date of Examination—March 22nd, 1926," that is not your handwriting?

A. No.

Q. And on the inside of that page, Mr. Borum (indicating)?

A. That is my handwriting there, yes (indicating).

Q. Well, there are a number of blanks after the printed matter, and the first one is "Give your name in full," and then the written words "James M. Borum"; you wrote that, did you?

A. Yes, sir.

Q. The next blank is printed "Date of birth," and then the written words "Oct. 20, 1883"; you wrote that, did you?

A. Yes, sir.

Q. And "Place of birth," and then the written words "Scott Co., Illinois"; you wrote that, did you?

A. Yes, sir.

Q. The balance of it, you filled out?

A. Yes, sir.

Q. You wrote that "Oct. 20, 1883" there (indicating) in March, 1926, in that second line, intending that the company would understand and believe that you were eleven years younger than you really were, didn't you?

A. No; my railroad age.

[fol. 77] Q. You wrote that in as your railroad age?

A. Yes, sir.

Q. That is the age which you gave to the railroad company throughout?

A. Yes, sir.

Q. You were actually at that time about fifty-three and one-half years old, weren't you?

A. Yes, I was.

Q. And by the statement which you made there of the date of your birth, you made it appear that you were about forty-two and one-half years old, that is right, isn't it?

A. My railroad age.

Q. You did that because you were afraid of the age limit?

A. That has been my railroad age ever since I went railroading.

Q. You did not want to tell the company any different, did you?

A. If they had asked me, I would.

Q. They did ask you when they presented you with that blank, did they not?

A. No, no—to fill it out.

Q. And didn't you understand, when they gave you this blank, and told you to fill it out, that they were asking you to put down the date of your birth?

A. The birth and my railroad age.

Q. You were not born on the railroad, were you?

A. No; that is the age that I am working under on the railroad, that age right there (indicating).

[fol. 78] Q. It is the age that you have given them, that is what you mean?

A. Yes, all through.

Q. All through?
A. Yes.
Q. You never gave them any different age at any time up to the time that you got hurt, did you?
A. Just my railroad working age there (indicating).
Q. Just the same as you have given it here (indicating), in all of these papers?
A. Yes; eleven years younger all the time.

Mr. Palmer: We offer in evidence Defendant's Exhibit 4, just the cover, the outside front cover; the written matter appearing on the outside and on the inside.
Mr. Davis: No objection.

By Mr. Palmer:

Q. In 1925, after you had begun work under this second employment, you took an examination for vision, color, sense and hearing, did you not?
A. Yes, sir, I guess I did.
Q. And you took that before Mr. J. C. Princell?
A. Yes, sir.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 7.

(Document marked Defendant's Exhibit 7 for identification by the reporter.)

Q. I call your attention to this Defendant's Exhibit 7, and I will ask you if that is your signature at the top of that page (indicating)?
A. Yes, "James M. Borum."
[fol. 79] Q. You see, after the word "Age," the figures "43"—I guess those are in Mr. Princell's handwriting?
A. Yes, those are in Mr. Princell's handwriting—not mine.
Q. Is that what you told him, that you were forty-three?
A. Yes, my railroad age—I told him that.
Q. You did not tell him your true age?
A. I just told him my railroad age, that is all.
Q. You did not tell anybody connected with the defendant company, in any way, shape or form, at any time, up to the time you got hurt, what your true age was, did you?

A. No; just my working age; that is all I ever gave them.

Mr. Palmer: I will offer Defendant's Exhibit 7 in evidence.

Mr. Davis: No objection.

Mr. Davis: I might ask you this, Mr. Borum:

Q. When you were examined in 1925 by this doctor, you were examined as to your eyesight and hearing?

A. That was when I was over at Shoreham.

Q. I say, when you were examined by Dr. Princell, you were examined as to your eyesight and hearing?

A. Yes, sir.

Q. After he filled this report out, you continued to work for the company?

A. Yes.

Q. You had no difficulty with either your eyesight or [fol. 80] your hearing?

A. No.

Mr. Davis: That is all.

Cross-examination continued.

By Mr. Palmer:

Q. You understood, when you made this second application in 1921, that if your application was not rejected within thirty days, that it would be considered accepted and your rights would attach as a switchman, didn't you?

A. Yes, according to the schedules.

Q. You knew that you could not be discharged after that thirty days except on written charges made against you, and a full hearing, at which you could have present some other employee of your choice to represent you, that is right, isn't it?

A. That is right (witness mumbling to himself, inaudible).

Q. You knew, when you made the second application, that you could not be discharged, except on written charges and for good cause, until you were sixty-five years old?

A. I thought it was seventy.

Q. You understood it was seventy years?

A. I thought it was seventy—I don't know; I did not know at the time what the age limit was for a discharge —pulling you out of the service.

(Previous answer read.)

Q. You had seen, or you were furnished with a copy of the pension rules of the company, were you not?

A. No, sir.

[fol. 81] Q. You had been informed that you could not be discharged, except on a hearing, and for cause, until you had reached the age of sixty-five, at least, Mr. Borum, had you not?

A. I was always informed that the age limit was seventy.

Q. Weren't you informed that after sixty-five you had to take a yearly examination, a physical examination, and then, if found fit, you could continue in the service until you were seventy; wasn't that the way you understood it?

A. That is the way I understood it, yes, that you work up until you are seventy.

Q. Yes; if you passed the physical examination after sixty-five, each year; isn't that right?

A. Yes, sir.

Q. So that by stating your age here as eleven years younger than you really were, you could continue in the service, without being discharged, except on a hearing, and for cause, and without taking any physical examinations until you were seventy-six years old, couldn't you—you understood that didn't you?

A. Yes, I understood it that way, yes.

Q. If you passed the physical examination successfully, after you were of the age of sixty-five, as shown by your application, being eleven years younger than you were, you could even continue in the service until you were eighty-one?

A. Yes, according to that law, you could.

Q. You never took any steps to correct or change this record of your age——

[fol. 82] A. No.

Q. (Continuing:) —as to the date of your birth which you had left in the employment office?

A. No. That is my railroad age right there (indicating).

Q. I say, you never took any steps to correct it, or change it, did you?

A. No.

Q. Your answer is "No"?

A. No, I said.

Q. You have stated that the duties of a switchman demand quickness of movement; that is right, isn't it?

A. Yes, sir.

Q. It is the most dangerous employment in railroad service, isn't it?

A. It is.

Q. It is the most dangerous to the employee himself, and the most dangerous to others, and the most dangerous to the public, and the most dangerous to railroad property, isn't it?

A. Yes, sir.

Q. A man's safety depends on his agility, his quickness of movement, his ability to get around quick, form quick judgments, act quickly, doesn't it?

A. Yes, sir.

Q. And the safety of others depends on that—the safety of the fellows working with him, is that right?

A. Yes, sir, you have got to look out for everybody—look out for yourself and everybody.

[fol. 83] Q. At the time you got hurt, you were past fifty-six years of age; that is, you were hurt on December 11, 1928, and on October 20, 1928, you were fifty-six years old; that is right, isn't it?

A. My regular age, yes, my date of birth.

Q. You were in your fifty-seventh year at that time?

A. Yes, sir.

Q. Do you mean to say that a man in his fifty-seventh year can get around just as quickly, perform just as quick judgment, and take care of himself and get out of the way, and do everything just as quickly, and as safely, as he can when he is thirty-five years old?

Mr. Davis: Do you have reference to this man, or to any man?

A. Not just only myself—I was just as supple when I got hurt as I was twenty years ago.

Q. But ordinarily, you would not expect that in a man, would you, now, as a switchman of long experience?

A. Yes, certainly. Lots of younger fellows is not as supple as a man of the age of sixty.

Q. That is very true, but you would not expect a man fifty-seven years old could get around as quickly and take care of himself and take care of the safety of other people

as well as you would a man thirty-seven years old, would you?

A. As a rule, no, but referring to myself, I was just as supple when I got hurt, as I was twenty years ago, or twenty-five years ago, and I can truthfully say that.

[fol. 84] Q. Did you make any attempt to get out of the way of this engine?

A. I did not see the engine coming at all. No bell or nothing was sounded. My back was turned—I was giving signals to our engineer down there.

Q. You don't know how quickly you could have gotten out of the way, of course, if you had seen it?

A. If I had seen that engine coming, I would never have been here, and I would have had my feet, too.

Q. You stated in your last application here, the one of October, 1921, that you had been employed by the Great Northern in 1917?

A. Yes, sir.

Q. That was after you resigned from the Soo Line?

A. Yes, sir.

Q. You had made a habit, had you not, all through your life, of stating that your age was ten or eleven years younger than it was?

A. My railroad age, yes.

Q. Regardless of any talk with Mr. Danforth, or anybody else, didn't you?

A. My railroad age, yes.

Q. When you made application for employment to the Great Northern, you made it in writing, did you not?

A. I did.

Q. And that was on April 5, 1917?

A. Yes, right in there somewheres.

Q. At that time you gave them a written and signed application, in your own handwriting and stated that you [fol. 85] were then thirty-four years of age, that is right, isn't it?

Mr. Davis: Have you got that to produce to him, or to show to him; he cannot remember that far back?

A. I cannot remember all these dates and everything.

Mr. Palmer: All right.

Mr. Davis: We will object to it as immaterial, and as having no bearing on the issues in this case.

Mr. Palmer: I think it has a bearing, and I think it is material in this case.

Mr. Joyce: The objection is overruled, and you may have your objection and exception preserved.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 8.

(Document marked Defendant's Exhibit 8 for identification by the reporter.)

Q. I show you this Defendant's Exhibit 8, particularly the first page of it; is that in your handwriting, Mr. Borum?

(Document submitted to the witness.)

A. Yes, sir.

Q. Is this your signature to it, "James Monroe Borum"?

A. Yes, sir, that is it.

Q. You made that on the day it is dated, April 5, 1917?

A. Yes, sir.

Q. After the printed words "Full name of applicant"—the written words "James Monroe Borum," you wrote that, did you?

[fol. 86] A. Yes, sir.

Q. After the printed words "Employment desired," the written word "Switchman"; you wrote the word "Switchman," did you?

A. Yes, sir. But here is a mistake right there (indicating).

Q. Under item 3, "Age," the written figures "34," you wrote that?

A. Yes.

Q. Under item 5, the printed words "Where born," you say—you understood that to be "When born," did you?

A. Yes.

Q. You put in there "Oct. 20, 1882"?

A. Yes; there is a mistake there; that should be a "3" (indicating).

Q. If it were a "3" it would be worse, wouldn't it?

A. That is my railroad age there, all the time.

Q. You intended to write that "83," did you, instead of "82"?

A. It was just my mistake; they hurried me up there.

Q. What?

A. They hurried me up when I was making out that application.

Q. So if you had had plenty of time, you would have put it in as a year younger, 1883?

A. Yes, I would have put it right.

Q. That is, you would have put it right, for your railroad age?

A. Yes, just for my railroad age.

[fol. 87] Q. So you have made a mistake in that application on your railroad age?

A. That is a mistake; that is all there is to it.

Q. It is a mistake of one year in your railroad age, and ten years in your actual age, is that right?

A. Yes, sir.

Q. You went to the examining surgeon of the Great Northern, in this connection, on April 5, 1917, didn't you?

A. Yes, sir.

Q. I call your attention to this second page, the printed word "Name," and the written name, "James M. Borum." You wrote that, did you?

A. Yes, sir.

Q. The question "Age," and the written figures "34," you wrote that, didn't you?

A. Yes, sir.

Q. As a matter of fact, you were about forty-four and one-half years old at that time, is that right?

A. Yes, sir.

Q. By writing it down that way, you made it appear that you were thirty-four and one-half years old?

A. My railroad age.

Q. On the third page, "Surgeon's Report of Physical Examination," you filled that out and signed the first part of that, and you give there, under "Age," "34," is that in your handwriting?

A. Yes, sir.

Q. And the name is in your handwriting, that is right, isn't it?

[fol. 88] A. Yes, sir.

Mr. Palmer: I will offer in evidence Defendant's Exhibit 8, the application of the Great Northern.

Mr. Davis: That is objected to as incompetent, irrelevant, immaterial, not involved in any issue in this case.

Mr. Joyce: The objection is overruled, and exception preserved.

By Mr. Palmer:

Q. You state in this second application which you made to the defendant company, that you had worked as a switchman for the Great Western Railway, that is correct, is it?

A. Yes, sir.

Q. You made application to that company for employment in August, 1917?

A. Yes, sir.

Q. You did not work very long for the Great Northern?

A. No.

Q. About how long?

A. The Great Northern or the Great Western?

Q. The Great Northern.

A. I don't know just when I did quit now. I did not work very long for either one of them.

Q. Did they find out your true age?

A. Not that I know of; my railroad age, that is all.

Q. Is that why you did not work for them very long?

A. No, I just quit.

[fol. 89] Q. You made a written application to the Great Western, did you not, in August, 1917?

A. Yes, sir.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 9.

(Document marked Defendant's Exhibit 9 for identification by the reporter.)

Q. I call your attention to Defendant's Exhibit 9; is that the application that you made to the Great Western Railroad?

A. Yes, sir.

Q. That is in your handwriting, is it?

A. Yes, sir.

Q. That is, the written portions of it?

A. Yes, sir.

Q. Now, under item 3, "Where born," you originally wrote in there——

A. (Interrupting.) Illinois.

Q. No; you wrote in there "October 20, 1883," didn't you, and then erased it, and put the word "Illinois" over it?

A. Well, somebody else must have erased that.

Q. How?

A. Born in Illinois—I did not put the month in there though.

Q. Didn't you write "October 20, 1883" there, and then erase it?

Mr. Davis: You could not tell what it is; I cannot.

A. No, I could not say.

By Mr. Palmer:

[fol. 90] Q. Item 4, your age, "34," you wrote that, didn't you?

A. Yes.

Q. They had an age limit, didn't they?

A. I could not tell you; I don't know.

Q. Were you informed that they had?

A. No, I was not informed that they had.

Q. Were you informed that the Great Northern Railway had an age limit?

A. No; as a rule, they have all got age limits, on the railroads.

Q. They have all got the age limit of thirty-five years?

A. I could not say.

Q. As far as you know?

A. I don't know.

Q. When you made that application to the Great Western, you were almost forty-five years of age, that is right, isn't it?

A. Not my railroad age, no.

Q. I mean, your actual age?

A. Actual age, yes.

Q. But you stated it as thirty-four?

A. Yes.

Q. You made a statement to the examining surgeon of the Great Western, in connection with that application, did you not?

A. Yes, sir.

Mr. Palmer: We offer in evidence Defendant's Exhibit 9.

Mr. Davis: Objected to on the same ground, as incom-[fol. 91] petent, irrelevant and immaterial, not within the issues.

Mr. Joyce: The objection is overruled; it will be received the same as all of the other exhibits that were received in evidence so far, subject to your objection and exception preserved.

Mr. Palmer: I ask to have these documents marked as Defendant's Exhibits 10 and 11.

(Documents marked Defendant's Exhibits 10 and 11 for identification by the reporter.)

Q. Showing you Exhibits 10 and 11, being applicant's statements to the examining surgeon of the Great Western Railway Company, are those in your handwriting?

(Documents submitted to the witness.)

A. Yes, sir.

Q. The blanks that are filled out there?

A. Yes, sir, they are all in my handwriting.

Q. Those were dated August 14, 1917, and you state there, under the item "Age"—"34," under item 2 in each of these exhibits; that is in your handwriting, isn't it?

A. Yes, sir.

Q. You were almost forty-five, that is right isn't it?

A. My railroad age was thirty-four, as I gave it; my real age was forty-five.

Q. I see you state in this Exhibit 11 there (indicating), that you joined the U. S. Navy in 1905; is that right?

A. No, I made application for it.

[fol. 92] Q. Did you give your railroad age, or your true age?

Mr. Davis: That is objected to as immaterial, not within any issue in this case.

Mr. Palmer: Do you recall about that?

Mr. Davis: He asked you if you remember what age you gave to the Navy; do you, or don't you?

A. Well, now, here (indicating), that is not my writing in the first place; that is not my writing here (indicating).

By Mr. Palmer:

Q. About the Navy?

A. This here is not my writing at all (indicating).

Q. Is that your signature to it (indicating)?

A. This is my signature down here (indicating); but that (indicating) is not my writing; I could not make that on a bet.

Q. This Exhibit 11, that statement—the writing of your name there (indicating), on item 1, that is yours?

A. Yes, sir.

Q. And the age is yours-?

A. Yes, sir, but this here (indicating) is not mine at all.

Q. That "Soo Line, 1911," that is not in your writing at all?

A. No, sir.

Q. How about "1905, joined Navy, U. S. A.," that is not in your writing?

A. No, sir.

Mr. Palmer: We offer Defendant's Exhibits 10 and 11 [fol. 93] in evidence.

Mr. Davis: The same objection.

Mr. Joyce: The same ruling.

By Mr. Palmer:

Q. You say you have a railroad age, an age which you gave to the railroads. Did you give to others, when you made application for employment, your true age?

A. My railroad age, that is all.

Q. Outside of the railroads entirely?

A. Not that I remember of.

Q. Did you give to others, to whom you made application for employment, your true age?

A. Not that I remember of.

Q. You don't remember of ever giving your true age to anybody?

A. Only just my railroad age, that is all.

Q. In 1918, you made application for employment to the Dupont Powder Company, at Washburn, Wisconsin?

A. Yes.

Q. You went into their employ, and remained there for some little time?

A. About eight months, I guess, something like that.

Q. About eight months?

A. Seven or eight months.

Q. Do you remember what date you gave them?

A. No, I don't.

Q. Do you remember what date of birth you gave them?
A. I must have given my right age and birth on there; [fol. 94] I don't remember what I gave them.
Q. You were not applying for railroad service, then were you?
A. No, that is no railroad service there, in the Dupont Powder Company.

Mr. Palmer: I ask to have this document marked as Defendant's Exhibit 12 for identification by the reporter.)

Q. I call your attention to Defendant's Exhibit 12; this is a photostatic copy, or purports to be—is that your signature, or a photostatic representation of your signature, on the top of that application, "James M. Borum"?

(Document submitted to the witness.)

A. Yes that is my signature.
Q. Did you give them the date of your birth here as October 20, 1878?

Mr. Davis: Is that in typewriting, or in his writing?
A. That is in typewriting. No, I did not give them that birth date.

By Mr. Palmer:

Q. Do you know where they got that from?
A. No, I do not. There is a mistake in taking my age down; I never gave them that as 1878, if it is there in black and white.
Q. But that is your signature on there (indicating)?
A. That is my signature here (indicating), yes, but that is filled out afterwards, by their man.
Q. You think it was?
[fol. 95] A. Yes, I never gave them that.
Q. But they got "October 20th" right?
A. "October 20th" is right, but "1878" is not right.
Q. That is not right, even on your railroad age?
A. No; I never gave them 1878.

Mr. Palmer: I offer Defendant's Exhibit 12 in evidence for what it is worth.
Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, not within the issues in this case.

By Mr. Palmer: They didn't have any age limit, did they, the Dupont people, if you know?

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial.

Mr. Palmer: Just answer if they had an age limit, if you know.

A. No, they have no age limit, that I know of.

Mr. Palmer: That is all.

Mr. Joyce: Defendant's Exhibit 12 may be received subject to the objection and exception.

Redirect examination.

By Mr. Davis:

Q. Mr. Palmer asked you the question, if, when you made these statements, you stated to anybody connected with the Soo Line any different age than your railroad age, and you testified that you did not in response to that question. But you also testified that you told Mr. Danforth that you were eleven years older than your railroad age. When you answered him "No," did you understand that he had any reference to Mr. Danforth at all?

[fol. 96] Mr. Palmer: That is objected to. He did not testify that he told Mr. Danforth any number of years difference in his age.

Mr. Stearns: I don't think he testified that he told Mr. Danforth his true age.

Mr. Davis: I think if you will go back in the record, you will find that he testified that he said he was eleven years--that his true age was eleven years more than his railroad age.

Mr. Joyce: I have the notes here on that, that he told him he was eleven years older than my railroad age.

By Mr. Davis:

Q. Did you tell Mr. Danforth that?

A. Yes.

Q. When you answered Mr. Palmer's question, you did not have reference to Mr. Danforth?

A. No.

Mr. Davis: That is all.

Mr. Joyce: Mr. Davis, in connection with this witness' testimony, you identified that map, but I don't know whether it was introduced or not.

Mr. Davis: We offer in evidence Plaintiff's Ex-Exhibit A.

Mr. Palmer: No objection.

Mr. Davis: It is stipulated between the parties that if, upon examination of Mr. Borum, his hearing or eyesight in 1926, or at any other time, were found to be so defective as to impair his ability to work as a switchman, that he would then be taken out of the service.

Mr. Palmer: Of course, with this qualification, if found [fol. 97] to be so defective that he could not work with safety to himself and others.

Mr. Davis: I said, so as to impair his ability to do his work.

Mr. Palmer: It would have to be impaired to the extent of the safety to himself and others.

Mr. Davis: If his hearing and eyesight were so defective as to jeopardize his safety, or the safety of others, that then he would be taken out of the service.

Mr. Palmer: That is all right.

Recross-examination.

By Mr. Palmer:

Q. Mr. Borum, you were advised, were you not, at least when you made this second application for employment, that the company had a pension system, so that if you were in the service fifteen years continuously, and then were put out of the service, either on account of having attained the age—the old age limit, or physically disqualified, that you would receive a pension?

A. No, I was not advised that way at all, not from the Soo Line employment offices—just only hearsay, is all I got.

Q. What I mean, you had information about that?

A. Not direct, no.

Q. Not direct, but you had that information?

A. It was just here in the last couple of years that I knew anything about this.

Q. In the last couple of years?

A. Yes, when they pinched off some of the old heads up [fol. 98] there, that is the first time I paid any attention to it—putting them on the pension list.

Mr. Davis: Plaintiff rests.

DEFENSE

F. A. DANFORTH, duly sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?

A. Frederick A. Danforth.

Q. What is you business?

A. General yardmaster.

Q. For the defendant company?

A. Yes, sir.

Q. You live in Minneapolis, Minnesota, do you?

A. Yes, sir.

Q. How long have you been general yardmaster for the defendant company?

A. Since 1909.

Q. You were general yardmaster at the time that the plaintiff made his first application, in 1911?

A. Yes, sir.

Q. You have so continued ever since?

A. Yes, sir.

Q. You know him, I suppose?

A. Yes, sir.

Q. You have known him since he began to work there in 1911?

A. Yes, sir.

[fol. 99] Q. What are the duties of a general yardmaster?

A. They have charge of the switchmen, making up and breaking up of the trains, seeing that the cars are interspaced right—switched to the different connecting lines.

Q. Do you hire men?

A. No, sir.

Q. Did you ever hire men since you have been in that position?

A. No, sir.

Q. Do the duties of your position involve at all the hiring of men?

A. I don't hire any men. It is not the duty of the yardmaster to hire men.

Q. Who was the employing officer in 1911?

A. I think Mr. Schutt.

Q. And who was the employing officer in 1921?

A. Mr. Flannigan.

Q. Their office is up town, in the general offices of the defendant company?

A. Yes, sir.

Q. And you have an office, do you?

A. Yes, sir, at Shoreham.

Q. And that is what is commonly known as the Shoreham Yards?

A. Yes, sir.

Q. The shops of the defendant company?

A. Yes, sir.

Q. That is about how far from the general offices?

A. I would say, about three miles.

[fol. 100] Q. You have heard the testimony of the plaintiff here?

A. Yes, sir.

Q. (Continuing.) —that sometime in 1921 he came to you and asked you about getting a job?

A. Yes, sir.

Q. Did he speak to you about getting a job?

A. Yes, sir.

Q. And what did you do with respect to that?

A. I told him that I would first have to take it up with the superintendent, to see if we could re-employ him.

Q. Why did you tell him that?

A. Why?

Q. Yes.

A. Because he had resigned at one time, and before they can hire, or before I could send anyone for new employment, I would have to take it up with the superintendent, to get permission, to let him go back to work.

Q. Well, you knew about the circumstances of his leaving?

A. Yes, I did.
Q. And did you talk to him about that?
A. I cannot say that I did.
Q. What were the circumstances of his leaving?

Mr. Davis: That is objected to as immaterial.

A. I think that when I spoke to him, I asked him if he would do better this time than he did before.
Q. And what did you have reference to?
A. On account of his drinking.
[fol. 101] Q. And what had come up with respect to that?
A. What had come up?
Q. Yes.

Mr. Davis: That is objected to as immaterial and too remote.

By Mr. Palmer:

Q. (Continuing.) —in connection with his prior employment?
A. Well, he was given the chance to resign at one time, on account of his drinking.
Q. That was about as he said—about March 1917?
A. I don't just remember when it was.
Q. Who gave him the chance to resign, or who spoke to him about it?
A. I told him that I thought he ought to resign, and that if he did not resign, he probably would be discharged.
Q. And he did resign, did he?
A. Yes, sir.
Q. Was that a violation of the rules, this drinking?
A. Yes.

Mr. Davis: That is objected to as immaterial and not within the issues of this case in any way.
Mr. Palmer: I will say that the purpose of it is to show the reason for this consultation with the superintendent, and his visit to the superintendent.
Mr. Joyce: The objection is overruled, and your exception may be preserved.

By Mr. Palmer:

[fol. 102] Q. That was a violation of the rules, as you say?
A. Yes, sir.

Q. What was the reason that you told him that you would have to take it up with the superintendent, Mr. Danforth?

A. I knew he had worked there at one time, and he—I gave him a chance to resign, and I knew that they would not put him back to work, or did not care about putting him back to work, I guess, but I was short of men, and that is the reason why I think they gave him the chance to go back to work again.

Q. Did you give him a slip, as he says, to the superintendent?

A. Yes, I did.

Q. Was that to the superintendent, or to the employment office?

A. That was to the employment bureau.

Q. That was to the employment department?

A. Yes, sir.

Q. Did you have any talk with him at that time, about his age?

A. No, sir, I never did.

Q. Did you ever have any talk with him at any time about his age?

A. No, sir; I did not know anything about his age.

Q. Was it any part of your duty to ascertain anything about his age?

A. No, sir, because I left that to the employment department.

[fol. 103] Q. He says that he told you that he had given his age, or his railroad age as eleven years different than what it was.

A. Well, sir, I will have to say that he did not.

Q. And did he ever at any time, ever talk with you about his age?

A. Not that I know of; I never asked the man his age.

Q. You told him that you would take up the matter of his employment with the superintendent?

A. Yes, sir.

Q. What was your reason for that?

A. Because I don't have any right to send a man down there that I know had been discharged from the company, or given a chance to resign on account of drinking.

Q. Did that have any relation whatever to his age?

A. No, sir; I was not figuring on his age at all.

Q. Did you have a conference with the superintendent about him?

A. I think I must have called him up, and told him that I would put Mr. Borum back to work if it were agreeable with him and the company—with the employment bureau there. I know I told him that I could use men, because I was short of men at that time.

Q. When next did you know anything about Mr. Borum's application for employment?

A. He came back with a letter from Mr. Flannigan's office—O. K., to put him to work.

Q. From that time until the time he got hurt, did you [fol. 104] have any knowledge whatever of his age?

A. No, sir, I did not.

Q. Or did you have any occasion to ascertain what his age was?

A. No, sir.

Mr. Palmer: That is all.

Cross-examination.

By Mr. Davis:

Q. Who discharges the men there in your yard?

A. The superintendent.

Q. The men under you?

A. Yes, sir.

Q. Who makes the charges against them, the men that are working under you—do you discharge them?

A. No, sir.

Q. Do you make any charges against them?

A. No, sir.

Q. You never make any charges against them for violating the rules?

A. If a man is doing wrong, we would have an investigation, and he is discharged by the superintendent.

Q. I presume it is your duty to see to it that the men do right, is it not?

A. That is part of my duty, yes.

Q. A great many men come to you for employment, do they not?

A. I do not hire men.

Q. I did not ask you that. Now, a great many men come to you for employment; answer that yes or no?

[fol. 105] A. Yes, they do.

Q. You have conversations with a great many of them, don't you?

A. When they come to me for a job, yes.

Q. Hundreds of them come to you every year, don't they?

A. No, not that many.

Q. How many would you say come to you every year?

A. I should say in the fall of the year it would be in the neighborhood of ten or fifteen—maybe twenty-five.

Q. You were badly in need of men at that time?

A. I was in need of men at that time.

Q. Would you have hired men at that time if they were over the age limit?

A. I don't hire men.

Q. If you had needed men, and knew that they were over the age limit, would you have hired them, or wouldn't you?

A. No, sir, I have nothing to do with that. I just give them a letter, and send them down to the employment office, and let them hire the men.

Q. You have known Mr. Borum since 1911?

A. Yes, sir.

Q. You knew from his appearance practically what his age was, didn't you?

A. I didn't know anything about his age.

Q. You did not know whether he was twenty or fifty?

A. I never gave it a thought.

Q. You never gave it a thought?

[fol. 106] A. No, sir—to how old the man was.

Q. You knew, of course, when he came to see you, when he asked for employment, that there was an age limit, didn't you?

A. Of course I knew that there was an age limit.

Q. You told him that you would have to go to see the superintendent?

A. I told him that day the reason why we could not put men back in the service until the superintendent said so.

Q. Who is the superintendent?

A. Mr. Curtis at that time.

Q. You saw him before you sent him to Mr. Flannigan?

A. I did not see Mr. Curtis.

Q. You called him up over the phone, did you?

A. Yes.

Q. Was that before or after you sent Mr. Borum to Mr. Flannigan?

A. That was before.

Q. How long after you had this first talk was it that you had this second talk with him?

A. With whom?

Q. With Mr. Borum?

A. I could not just remember; maybe a week or so.

Q. I presume you can remember everything that is said, with every man that talks to you?

A. No, sir, I cannot.

Q. Do you mean to say that when Mr. Borum said he had a talk with you about his age, that you don't remember it, [fol. 107] or that you might have been mistaken about it?

A. I could remember it if he spoke about his age. Now, I never gave his age a thought when he came back to work.

Q. You would remember that particular conversation, wouldn't you; you would remember it back nine years ago —or seven years—you would remember the talk with Mr. Borum?

A. I remember talking to Mr. Borum.

Q. You remember every word that was said?

A. No, I would not say that I remember every word that was said but I say, there was nothing said about his age, at that time, to me.

Q. Would you say that you don't remember of anything now—of anything being said about his age?

A. He didn't say anything about his age.

Q. That you now remember of?

A. At that time he did not say anything about his age to me.

Q. You don't remember of his saying anything about his age; is that what you mean—be fair to Mr. Borum and yourself?

A. No, sir, he never said anything about his age to me, nor I didn't say anything about his age to him.

Q. To put it baldly, you would say that Mr. Borum lied here, when he said that he told you about his age?

A. About Mr. Borum saying that I said so, that he and [fol. 108] I had a conversation, he and I never mentioned his age.

Q. You remember all the conversation, then, with Mr. Borum, do you?

A. I won't say that I do remember all the conversation.

Q. If you don't remember all of it, wouldn't it be fair for you to say, Mr. Danforth, that the best you could say was that I don't remember of having any talk about his age; wouldn't that be your testimony?

A. I would not say that it would, but I know that we did not have any conversation about this man's age.

Q. That you can remember?

A. That I remember of, of having a word to say about his age.

Q. That is what you would say. Men do come to you and apply for work, don't they?

A. Yes, sir.

Q. You are the yardmaster there?

A. Yes, sir.

Q. It is part of your duty, of course, to know that the men are of proper age to work, isn't it?

A. I don't know nothing about that at all; I don't hire them; they are sent down to Mr. Flannigan's office; and if their age entitles them to go to work, he gives them a letter back to me, and we put him to work.

Q. If a man came to you and said, "I am fifty-two years old, but I want a job as switchman"?

A. If he told me he was fifty-two years old, I would tell [fol. 109] him he was too old for that job.

Q. You have men come to you who are over the age limit, to go to work?

A. I could not say.

Q. You knew Mr. Borum in 1911?

A. Yes, sir.

Q. You knew him when he worked there?

A. Yes, sir.

Q. You knew him in 1921?

A. Yes, sir.

Q. He worked from 1921 until the time he was hurt there, and lost his feet?

A. Yes.

Q. During that time he was a good workman there, so far as you know?

A. Yes, sir.

Q. He did his work properly?

A. I never had any complaint.

Q. He did his work as a switchman as well as any other switchman, isn't that true?

A. Yes, sir.

Q. And did just as much work as a younger man?

A. I won't say that. I had no complaints; there was no complaints by any of the foremen that he ever worked with.

Q. So far as you know, his work was as satisfactory as any other switchman?

A. His work was satisfactory.

Q. Just answer the question. Was his work just as satisfactory as the work of any other switchman that worked there?

[fol. 110] A. I did not have any complaints by any foreman that he worked for.

Q. You saw him around working, didn't you?

A. Yes.

Q. You observed his ability to do his work?

A. Yes; I have had no fault to find with his work.

Q. You saw him working there?

A. Yes, sir.

Q. He moved about as rapidly as most of the men there, didn't he?

A. I should say he did.

Q. He did his work just as well as anyone there, didn't he?

A. Yes, I could not say but what he did.

Redirect examination.

By Mr. Palmer:

Q. What will you say, Mr. Danforth, as to what is required of a switchman, in a switching yard of the magnitude of the general yards here? I mean, as to quickness of movement?

A. A man has to be watching all the time to keep out of the way of cars and engines.

Q. How will it compare, as to being hazardous as compared with other railroad employments?

A. It is hazardous, of course; it is one of the most dangerous work there is around railroads, is the switching of cars.

Q. What is the fact as to its requirements, as to quickness of motion, and agility?

A. Yes, quickness of motion; sometimes you have to move pretty quick.

[fol. 111] Q. And quick judgment?

A. Yes, sir.

Q. Has it been your experience that, as a general proposition, that the younger a man is the better off he is—over the age, we will say, of twenty-one?

A. Of course, younger men can get around quicker than older men, anyway.

Q. As to the general safety and efficiency of the service, what has your policy been there, to have younger men—or young men—I will put it that way.

A. Well, now, Mr. Palmer, I don't have anything to do about the hiring of men, or anything of that kind. I send the men down to the employment bureau for a job, and they come back and go to work; so I don't ask him how old he is, or anything of that kind. If I don't have any complaints from the foremen running the crews, why, his work is satisfactory.

Q. You leave it, then, entirely to the employment department?

A. Yes, sir.

Q. You leave it to them to establish and enforce their employment rules?

A. Yes, sir.

Q. As to the age limit?

A. Yes, sir.

[fol. 112] Dr. JOHN H. RISHMILLER, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your name is John H. Rishmiller?

A. Yes, sir.

Q. You live here in Minneapolis?

A. Yes, sir.

Q. And you are the chief surgeon for the defendant company, are you?

A. Yes, sir.

Q. How long have you held that position?

A. Since the Wisconsin-Central was taken over by the Soo Line.

Q. That was in the year 1909?

A. I think so.

Q. So that for more than twenty years you have held that position?

A. Yes, sir.

Q. What have you to do with respect to applications for employment with the company, Doctor?

A. The chief surgeon supervises the physical examinations over the system, and also does the physical examination here in Minneapolis.

Q. So that if there is an application for employment here in Minneapolis, who makes the physical examination?

A. I do, or else somebody delegated to do it.

Q. Designated by you?

A. Yes, sir.

[fol. 113] Q. And how are the applicants referred to you, Doctor?

A. They are furnished with a request slip, usually by the employment department, for making a physical examination—requesting a physical examination.

Q. And they bring that slip to you, as the authority for your examining them?

A. Yes.

Q. And then, do the applicants themselves make a statement to you of their physical condition?

A. They do.

Q. That is, on regular blanks provided by a defendant company?

A. Yes, sir.

Q. I call your attention to this Defendant's Exhibit 2, which purports to be a statement by the plaintiff, of his physical condition. (Document submitted to the witness.) Was that made to you?

A. Yes, sir.

Q. By him personally?

A. Yes, sir.

Q. And the second page of it was made out by you and signed by you, is it?

A. The second and third pages.

Q. The first page is in his handwriting?

A. Yes, sir.

Q. He states there, Doctor, that the date of his birth was October 20, 1883, which would make him about twenty-eight years old at that time; did you accept that statement that was made on there?

[fol. 114] A. Yes, sir.

Q. You relied upon it?

A. I relied upon it, yes.

Q. Believed it to be true?

A. Yes, sir.

Q. Did you have any reason from the man's appearance or otherwise to doubt the truth of the statements that he made there?

A. I did not.

Q. Take Defendant's Exhibit 5, which purports to be a statement of the physical condition made by the plaintiff in 1921—the first page of that was made out by the applicant?

A. Yes, sir.

Q. The second and third pages, by yourself?

A. Yes, sir.

Q. He states there, Doctor, that he gave the date of his birth, October 20, 1883, which would make him at that time a little past the age of thirty-eight years, and eight days—over thirty-eight years of age; did you accept that statement?

A. I did.

Q. And you relied upon it as true?

A. I relied upon it, yes.

Q. Did you have any reason to doubt the truth of that statement?

A. No, sir.

Q. Was there anything in his appearance that showed you that the statement was not true?

A. There was nothing in his appearance.

Q. You knew what the age limits were?

A. I do.

[fol. 115] Q. And, at that time, for experienced men, the age limit was—what?

A. Forty-five.

Q. If a man did appear to be over the age of forty-five years, what is your practice?

A. We make a notation at the bottom of his physical examination report, stating the opinion as, for instance, I

might say, if he gives an age of, say, forty-two years, and he appears to be ten years older, I would state that he appears ten years older than the age given.

Q. Would you put that on the blank?

A. Yes, I would put that on the blank.

Q. Have you any notation of that character on this blank (indicating)?

A. No, sir; it is always put down at the bottom of the third page.

Q. And there is no such notation there on this one (indicating)?

A. There is no notation of that character.

Q. You are familiar, Dr. Rishmiller, with the pension system, are you?

A. Yes, sir.

Q. And briefly, what is that system?

Mr. Davis: That is objected to as immaterial, and not within any issue in this case.

Mr. Joyce: The objection is overruled.

By Mr. Palmer:

Q. Well, as to the age of retirement—I will put it that way?

A. The age is—if an employee reaches the age of sixty-five years, he will require a physical examination annually, [fol. 116] and if he is considered competent to do his work, he is kept in the service until, I think, seventy or seventy-one years of age. If a man has worked for the company fifteen years or more, and if he has a physical defect which impairs his usefulness, then he can be retired on pension. A man, who has worked less than fifteen years, and reaches the age of sixty-five he cannot draw a pension.

Q. But does he come out of the service unless he passes his annual physical examination, after sixty-five?

A. He goes out of the service if he is disqualified, after sixty-five, if he has a disqualifying defect, and is of such a physical condition that he is not able to do the work as required of him.

Q. But he has to take an annual examination?

A. He has to take an annual examination.

Q. Up to the age of sixty-five, does he take an annual examination at all?

A. No, sir.

Q. He does not?

A. Unless requested, in special cases, who we know have physical defects—some of them are examined annually, and some of them every six months—exceptional cases.

Cross-examination.

By Mr. Davis:

Q. You made a thorough physical examination of him in 1921, did you not?

A. Yes, sir.

Q. And you examined his lungs?

[fol. 117] A. Everything that requires physical examination.

Q. His lungs and his heart?

A. Yes, sir.

Q. Did you examine his chest?

A. Yes, sir.

Q. His muscles?

A. Yes, sir.

Q. Muscular development?

A. Yes, sir.

Q. Did you notice the form of his muscles?

A. Yes, sir.

Q. The apparent strength or lack of strength; you examined that, and watched that, of course?

A. I just observed his muscular development, to see whether he had any muscular defects.

Q. You found none in him?

A. No, sir.

Q. From that physical examination that you made, you were satisfied from that examination that he looked every bit the part of a man thirty-eight years of age?

A. Yes, sir.

Q. As normal?

A. Yes.

Q. His heart was normal?

A. Yes.

Q. His kidneys were normal?

A. (Witness looking at exhibit.) He practically passed a normal examination.

Q. Yes. Well, his eyesight was normal, was it not, Doctor?

[fol. 118] A. (Witness looking at record.) His eyesight was, in the right eye, slightly off.

Q. Do you remember whether you found any difference from your examination in 1911, as to eyesight, as compared with 1921?

A. Well, we will have to compare the two papers. (Witness does so.) The eyesight of 1911, the right eye was 20/20, and the left eye was 20/15. His eyesight in November, 1921, the right eye was 20/30 plus; the left eye was 20/50 minus 2. There is some difference, which naturally comes on by age, but in explanation I want to say that the right eye 20/20—the right eye in 1911, and the right eye of 20/30 plus is very close, about the same.

Q. Very close, about the same?

A. Yes, sir.

Q. From your examination in 1911—you remember the examination in 1911?

A. No, I don't.

Q. You don't remember that?

A. No.

Q. Do you remember that you examined him the second time in 1921?

A. Just from my signature there.

Q. You examined him, according to this record?

A. Yes, sir.

Q. From that examination, you made the report here, that his physical condition was good, didn't you?

A. Yes, sir.

Q. He was proposing to do the work of a switchman—you knew he was to work as a switchman?

[fol. 119] A. Yes, sir.

Q. You found nothing in your examination to indicate any high blood pressure, did you, in 1921?

A. (Witness looking at record.) The blood pressure was normal, or within normal limits.

Q. Within normal limits for a man thirty-eight years of age?

A. Well, anywheres in that neighborhood.

Q. What is the normal blood pressure for a man thirty-eight years of age?

A. There is no normal blood pressure.

Q. What did you mean by saying that it was normal?

A. Well, it is normal—I think it is 110 systolic and 76 diastolic; if anything, that is low blood pressure.

Q. And would you expect to find that in a man thirty-eight, or is it unusual to find that in a man of thirty-eight?

A. That is low blood pressure in a man of thirty-eight.

Q. What would that indicate, that he was older than that?

A. No, you cannot say whether he is older or younger.

Q. Blood pressure differs very much in different individuals, doesn't it?

A. Yes, sir.

Q. Some men will have a high blood pressure at thirty, and others at sixty?

A. What is that?

Q. Some men might have high blood pressure at thirty, [fol. 120] due to various causes?

A. They might, yes.

Q. But in any event, Dr. Rishmiller, from your entire examination of Mr. Borum, you would say that, from all the physical finding that you have made, that he had the appearance of a robust, strong man thirty-eight years of age?

A. Yes, sir.

Q. When you examined him in 1921?

A. Yes, sir.

Q. Solid muscles, and in good shape, and everything was—in your opinion, he was fully capable of doing the work of a switchman?

HORACE H. CASSADY, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. Your name is Horace H. Cassady?

A. Horace H. Cassady.

Q. And you live here in Minneapolis?

A. Yes, sir.

Q. What is your business?

A. Train dispatcher for the Great Northern Railroad.

Q. How long have you been a train dispatcher?

A. I have been with the Great Northern thirteen years, and prior to that I worked several years as dispatcher on the Illinois Central Railroad.

Q. What were you doing in 1911?

A. I was employed as chief clerk in the employment department of the Soo Line, Minneapolis.

[fol. 121] Q. And how long were you chief clerk in the employment department of the Soo Line?

A. About five years.

Q. And what were the duties of that position?

A. In addition to the employment, we had other matters that we took care of, but in regard to employment, I hired the brakemen and switchmen, operators and agents.

Q. Were you the employment officer?

A. I was the chief clerk under the superintendent.

Q. Who was the superintendent, or employing officer?

A. W. H. Schutt.

Q. I call your attention to this application which has been marked Defendant's Exhibit 1.

(Document submitted to the witness.)

A. Yes, sir.

Q. You recall that to mind, do you.

A. I do from my initials appearing on it.

Q. And where do your initials appear?

A. Right here (indicating); here they are (indicating).

Q. That is on the end of the second page?

A. Yes, sir, at the end of the second page.

Q. That is, the initials appearing there, "H. C. 11/28/11"?

A. Yes, sir.

Q. That is in your handwriting, is it?

A. Yes, sir.

Q. Do you recall to mind this man especially?

A. No, I do not.

[fol. 122] Q. What was the practice followed in the employment department at that time?

A. The applicant would come to the office, stating what position he desired, and I had a set of questions of my own that I asked him, to see whether I considered him fit to enter the service, such as his experience, his age, and anything else that might occur—that may have come about

in the way of ordinary conversation, but I elicited that certain information in all cases.

Q. And then what?

A. If I was satisfied that he would be all right, he filled out the application, and I sent him over—gave him a note wherever we want to use him.

Q. And what about a medical examination?

A. Yes. Before sending him out to work, we always sent them to the examining surgeon, and that, of course, had to be C. K.'d by him.

Q. Then, would the man return to your office?

A. Yes.

Q. After the medical examination?

A. Yes, sir.

Q. In this Defendant's Exhibit 1, I observe and it has been testified to, that the applicant writes in the position for which he applies, his name in full, his age and date of birth?

A. Yes, sir.

Q. And in this (indicating) appears "Age—28 years," "Date of birth—October 20, 1882"; did you have anything to do with the man putting that down?

A. I gave him the application, and he filled it out, and [fol. 123] then handed it back to me. I did not instruct him how to fill it out; he would have to follow the questions.

Q. Yes. And did you, when that was written down there—did you accept it and rely upon it?

A. Yes, sir.

Q. You believed it to be true?

A. Yes, sir.

Q. Did you suggest in any manner to the applicant what he should put down as his age, and date of birth?

A. No, sir.

Q. What were the age limits at that time?

A. Forty-five years was the age limit for all classes of employees that are entering the service; we would not take them over forty-five years of age, and unexperienced men, we would not take them over thirty-five years.

Q. Unexperienced men?

A. Unexperienced men, or with limited experience.

Q. Experienced men you would take at forty-five?

A. Up to forty-five.

Q. Up to forty-five years, and not over that?

A. No, sir.

Q. And that was the rule in force at that time, was it?

A. Yes, sir.

Q. Was that the rule which you observed in making this employment?

A. Yes, sir.

[fol. 124] Cross-examination.

By Mr. Davis:

Q. Mr. Cassady, who was the superintendent at that time?

A. Mr. W. H. Schutt.

Q. Do you know who is the superintendent now, or who was in 1921; who was the superintendent in 1921.

Mr. Palmer: Mr. Flannigan was the employing officer.

Mr. Davis: Who was the superintendent?

Mr. Palmer: Mr. Curtis was the superintendent of the Division.

Witness: Mr. Curtis was superintendent of the Division, but Mr. Schutt was superintendent of the employment bureau.

By Mr. Davis:

Q. Mr. Schutt was superintendent of the employment bureau?

A. Yes.

Q. And his offices were in the Transportation Building at that time?

A. Yes, sir—now, let me see—1921?

Q. I mean, in 1911, when you were there?

A. Yes, they were there in the old office building.

Q. As I understand it, if a man came to you I presume sometimes the yardmaster sent men up there to apply for work—different ones?

A. Yes.

Q. The way they would send them up to you, as Mr. Borum said, he would have a slip, and you would examine [fol. 125] that slip and talk with them?

A. Yes, sir—not always, though.

Q. Well, sometimes, perhaps, he might phone you, and sometimes they might come up without anything?

A. Yes, and they might come up without anything, and I might phone over, to ascertain if they needed men.

Q. And frequently, the yardmaster being in need of men, would send men up there with a slip?

A. Yes.

Q. And when they came, as I understand it, your practice was that you would visit with them, and size them up, ask them some general questions as to their identity and satisfy yourself as to that?

A. Yes.

Q. And size u their general physical build, to see if you think that they were fit for the position that they applied for?

A. Yes.

Q. And you also inquired as to their age, to see if their appearance, the r general appearance and build, corresponded within r·asonable limits to their age?

A. Yes.

Q. And that w as part of the work that you did in hiring these men, wasn it.

A. Yes, sir.

Q. From the appearance of Mr. Borum at that time, in 1911, was that of a man twenty-eight to thirty years of age?

A. Yes, sir.

[fol. 126] Q. Y u saw no reason to send him to the superintendent, to inquire about anything further in regard to him; you took h application and sent him to the doctor, I presume?

A. Yes, sir.

Q. When you asked these questions, to see whether he was fit for the service, as you said on direct examination, if there was some doubt in your mind, you would then send him to the superintendent, wouldn't you, so that he could pass upon it, rather than you assume the responsibility?

A. I don't recall having ever done that.

Q. When you were not satisfied about it, what would you do; you must finally pass these things, as to his fitness, of course; if you thought he was not fit for it, well, that ends it?

A. Yes.

Q. There was not anybody beyond you, as I understand it; you were the final word, as to whether he was fit for the service in your opinion, that is correct, isn't it?

A. Mr. Schutt, of course, was over me, but in the ordinary run of applications, I never referred any of them to Mr. Schutt.

Q. You don't have any recollection at any time of sending anybody to Mr. Schutt?

A. No, sir.

Q. You questioned them and they filled out their application, and, having satisfied yourself that they were fit for the service, you would see to it that their applications were filled out, and then you filed them?

[fol. 127] A. Yes, sir.

Q. That was part of your work at that time, and was part of your work that you did there in that department?

A. Yes, sir.

Mr. Joyce: I would like to ask this witness a question.

Q. You say these gentlemen would come to you with a slip, either from the yardmaster or somebody else; what was the substance or wording contained in that slip?

A. It would be addressed to Mr. Schutt, and read, perhaps, as follows: "Bearer, Mr. James M. Borum, I would like to use as a switchman." And that would be about all. Or, he might even 'phone to me, and he would say: "If you find any switchmen coming in there, hire them, and send them over."

Redirect examination.

By Mr. Palmer:

Q. Mr. Cassady, you say Mr. Schutt was superintendent; you mean Mr. Schutt was the superintendent of employment?

A. Yes, sir.

Q. You did not mean the operating superintendent on the Minneapolis Division?

A. No, sir.

Q. Who was the operating superintendent at that time?

A. Mr. F. W. Curtis.

Q. Mr. F. W. Curtis?

[fol. 128] A. Yes, he had charge over this yard here.

Q. Do I understand you to say that you did not make

a practice of sending the applications to the operating superintendent?

A. No, I did not.

Recross-examination.

By Mr. Davis:

Q. Mr. Cassady, when a man came in and made application, or brought a slip to you, you would question him yourself?

A. Yes, sir.

Q. You did not make it a practice of sending him to Superintendent Schutt, but you would ask him questions, and he filled out the application?

A. Yes, sir.

Q. In answer to my question as to how you did that, you knew I had reference to the superintendent of employment, and not to the operating superintendent?

A. Yes, sir.

W. H. SCHUTT, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. State your full name.

A. William H. Schutt.

Q. You live here in Minneapolis?

A. Yes, sir. Since 1892.

Q. What is your business?

A. Nothing at present.

Q. You have retired?

[fol. 129] A. Yes, sir.

Q. What was formerly your business?

A. I was with the Soo Line for thirty-seven years, and prior to that in the lumber business, ten years.

Q. In what capacity were you with the Soo Line?

A. From a fifty dollar clerkship up to assistant to the general manager, and in various capacities.

Q. In 1911, what position did you hold?

A. We opened up that employment bureau on January 1, 1910, the records prior to that were kept in the general

manager's office; so in 1911, I was superintendent of employment, and a number of other things.

Q. As I understand it, the employment bureau, as a separate institution, was not established until January 1, 1910?

A. That is right.

Q. And you were the first superintendent of employment?

A. Yes, sir.

Q. How long did you hold that position, Mr. Schutt?

A. I don't know the exact date, but I think it was some time in 1918 that I went out of the office.

Q. As superintendent of employment, what were your duties?

A. Keeping the records of employees, and as the head of the employment office, all applications came there for approval, and we always hired direct—received applications [fol. 130] there direct, and placed the men as the superintendent and various officials wanted men; they used to keep us advised of their requirements, and we would try to fill the vacancies.

Q. Who was in active charge, in 1911, of the work in your office, of taking these applications?

A. I left that to my chief clerk.

Q. That was Mr. Cassady, the witness last on the stand?

A. Yes, sir.

Q. When a man made a statement in his written application of his age, and the date of birth, Mr. Schutt, I will ask you whether or not that was accepted and relied upon by the department?

(Document submitted to the witness.)

A. Yes, it was accepted in accordance with this (indicating). Of course, I don't remember anything about that application. From appearances, this indicates that I never saw it, and I don't usually see them, unless there was something unusual coming up.

Q. As to the statement of his age and date of birth, did you accept that and rely on it?

A. Oh, yes, unless it was very apparent that there was something wrong.

Q. Something has been said here by Mr. Borum about a railroad age being a different proposition from the true age; did you recognize any such distinction as that?

A. No, I should say not.

Q. Did you expect a man to give his true age and his true date of birth, and rely upon it when he gave it?

[fol. 131] A. Yes, sir, most certainly.

Q. I call your attention to this little booklet, which is entitled "Pension System of Minneapolis, St. Paul, and Sault Ste. Marie Railway Company."

A. (Interrupting.) Yes, sir.

Q. (Continuing.) Have you had anything to do with the formulation of that booklet?

A. Yes, sir.

Q. What did you have to do with it?

A. In the latter part of 1909, Mr. Pennington talked to me about a pension system; he told me he wanted me to go into the matter thoroughly at that time, and requested that I make a trip. I went down to New York, Pittsburgh, Chicago—and I guess that was all—well, here in St. Paul and Minneapolis, too. And after I got back here, I submitted this plan, virtually—there were some corrections made in it at the time, and later, and it was put into effect as of July 1, 1910.

Q. Let me call your attention particularly to this Rule 16, on page 11 of this booklet, was that formulated by you?

A. Yes, sir.

Mr. Palmer: I offer in evidence this Rule 16, on page 11 of this Pension System booklet, which reads as follows:

"No person inexperienced in railway work, over thirty-five years of age, and no experienced person over forty-five years of age, shall hereafter be taken into the service; provided, however, that, in the discretion of the president, persons may temporarily be taken into the service irrespective [fol. 132] of age for a period not exceeding six months, and that this period may be extended, if necessary, to complete the work for which said persons were originally employed; provided, also, that persons may be employed irrespective of the age limit, where the service to be rendered requires professional or other special qualifications."

Mr. Davis: That is objected to as no foundation laid, and it is incompetent, irrelevant and immaterial, and self-serving.

Mr. Joyce: The objection is overruled and exception preserved.

By Mr. Palmer:

Q. And was that rule in force and effect from July 1, 1910, on?

A. Yes, sir; it was in effect from January 1, 1910, on, when I took charge, and as far as I know, it has been in effect and in practice with our road as well as all other roads in the country; it was the general practice of railroads, and you will find it so today.

Q. That is, prior to the adoption of this rule, do you mean?

A. Yes, sir; well, that is put in there—it is simply a representation of what was in effect and what had been done.

Q. Do I understand you to say that this same rule as to age limits had been in force and effect prior to the adoption of this pension system?

A. Yes, sir, with our railroad, and other railroads.

Q. That this rule stated here, is simply—that was sim-
[fol. 133] ply declaratory of the existing practice?

A. That is right.

By Mr. Joyce:

Q. Mr. Schutt, in what manner, if any, was this pension system plan brought home to the new men, as they came into the service?

A. I don't understand the question.

Q. Well, were the men advised of the existence of this pension system when they entered the employ of the Soo Line?

A. I think I had about five thousand of these printed and distributed them all around, through the superintendents—asked them to give every employee a copy.

Q. As to whether they have carried that out, to what extent, you don't know?

A. I don't know. We had no check on it, but they were sent to the general superintendents, and we had a big supply of them printed, and I guess we have got a lot of them on hand yet.

Q. Was there any practice that you know of, of employing men there in your department or elsewhere, to advise the various new employees with reference to the pension system and other things of material import to them?

A. No; but they usually knew about it; it was talked about a great deal.

Q. I am asking you if you knew of any such practice?

A. No, I don't remember of ever advising them.

(Direct examination continued.)

By Mr. Palmer:

[fol. 134] Q. Was this pension system, or this little booklet on the pension system, put out in general circulation among the employees, Mr. Schutt?

A. Yes, I stated before that they were distributed to the superintendents, and in a general way to the heads of the departments for distribution.

Mr. Joyce: When a man left your department, and was authorized to take employment, he was not supplied with this book or any other written material which he should familiarize himself with, regarding his future work?

A. Not that I know of.

By Mr. Palmer:

Q. I call you attention, Mr. Schutt, to this page 7—4 (A); it seems to have been in there originally, and then pasted on there with some changes. (Document submitted to the witness.) Did you formulate that?

A. Yes, sir.

Q. That formed a part of your pension system, did it?

A. Yes, sir.

Q. Do you know whether that was the existing practice prior to the adoption of this pension system?

A. This "4 (A)" is a revision to the one underneath there (indicating).

Q. What is the number of the one underneath?

A. The same thing "4 (A)," but this elaborates a little bit more on it, but the essence of it is the same, sixty-five years (indicating).

Q. Sixty-five years is the maximum limit?

[fol. 135] A. Yes, it is the maximum, except with the approval of the Pension Board, if he comes in the service on the recommendation of the employing officer; in other words, if they are fit, why, we keep them.

Q. Until what age?

A. Seventy.

Q. Do you know when this revision was made that is pasted in here (indicating)?

A. No, I don't, but it was, I think, within a couple of years of the time that it took effect, and the reports of the Pension Bureau, which Mr. Flannigan now has, will give you the exact date.

Mr. Palmer: We offer in evidence this rule 4 (A) on page 7 of this booklet, which reads as follows:

"All officers and employees who have attained the age of sixty-five years shall be retired; provided, however, that the Pension Board, with the approval of the president, shall have power to retain in the service any officer or employee who has reached the age of sixty-five years, if in their opinion it is in the interest of the company so to do, but such retention in the service shall not extend beyond the period when such officer or employee shall have attained the age of seventy years; provided, further, that any officer or employee who shall elect to remain in the service of this company after having attained the age of seventy years, shall by reason of such election forfeit any and all claim, right, benefit and privilege to and of the pension herein provided for, unless such election to remain in the [fol. 136] service shall for each and every year after said officer or employee shall have attained the age of seventy years, been first approved by the president, board of directors or Pension Board; provided, further, that this clause shall not apply to officers elected by the board of directors."

Mr. Davis: The same objection, incompetent, irrelevant and immaterial, and no foundation laid, self-serving.

Mr. Joyce: I don't believe this is of much value, Mr. Palmer, unless there is some showing that it was brought home to Mr. Borum, as far as applying to him.

Mr. Davis: Mr. Borum has testified that he knew nothing of it.

Mr. Palmer: On the contrary, Mr. Borum testified he did know about it, and understood it.

Mr. Davis: He said he did in the last two years.

Mr. Joyce: The objection will be overruled, and exception preserved.

Mr. Davis: He said in the last two years he heard of it.

Mr. Palmer: I will also offer in evidence paragraph B on page 7, of this Pension System booklet, which reads as follows:

"Every officer or employee who at date of retirement shall have been fifteen years continuously in the service shall be pensioned."

Mr. Davis: Same objection, no foundation laid, incompetent, irrelevant and immaterial, and self-serving.

Mr. Joyce: The same ruling.

[fol. 137] Mr. Palmer: And I will also offer paragraph C, reading as follows:

"Officers and employees who have been fifteen or more years continuously in service, and who have become permanently incapacitated, may be retired regardless of age."

Mr. Davis: The same objection, incompetent, irrelevant and immaterial, no foundation laid, and self-serving.

Mr. Joyce: The same ruling.

Mr. Palmer: Who comprises the Pension Board, Mr. Schutt?

Mr. Davis: What materiality has that, Mr. Palmer?

By Mr. Palmer:

Q. How many are there on the Pension Board?

A. Seven.

Q. Officers of the company?

A. Yes, sir.

Mr. Joyce: Mr. Schutt, this record shows that Mr. Borum went back to work in 1921, the second time, and that he was hurt in December, 1928; he was there approximately some seven years. Assuming that a few days before this accident, you had discovered that he was eleven years older than he had told you, and, assuming also that his work was satisfactory throughout that period, as indicated by the testimony of Mr. Danforth, what would you have done on the obtaining of that information?

A. I don't think that anything could have been done at that time. We have got to get at that in accordance with [fol. 138] our agreement with the organizations—why, you have got to discover anything of that kind within a certain limit, and that does not cover years; it covers months.

Mr. Davis: Thirty days, Mr. Schutt?

(No answer.)

Mr. Joyce: Assuming that you had employed a man outside of the organization, who was not bound by the contract with the organization, and that same information would come to you, what would you have done under those circumstances?

A. Oh, I don't know; that is a question.

By Mr. Davis:

Q. Supposing he was a good man, you would let him work, wouldn't you?

(No answer.)

Q. If he did his work all right, you would let him stay, wouldn't you?

A. If he was desirable—it just depends upon whether he is desirable or undesirable. If he lied about his application, that would be enough: we would try to get rid of him; we would get rid of him if we could.

By Mr. Palmer:

Q. Well, as I understand it, if he was to be rejected, he would have to be rejected within thirty days from the time of his application, Mr. Schutt?

A. Yes, sir.

Q. And if you did not find it out within the thirty days, then he could not be discharged, unless charges were preferred against him, and a hearing had, and good cause [fol. 139] shown for his discharge. Do you know whether or not that would be considered sufficient cause, he having falsified his age?

A. Well, now, I could not pass on that.

Q. You would have to fight that out with the organization, would you?

A. There are lots of things happening, and would happen, if taken up with the organization. We win sometimes, but usually we lose.

Q. What was the purpose of this rule, fixing the age limit at thirty-five for inexperienced persons, and forty-five for experienced persons, in the train service as switchmen?

A. Safety and efficiency, I think, would answer that.

Cross-examination.

By Mr. Davis:

Q. Mr. Schutt, you were the employing officer in 1911?

A. Yes, sir.

Q. Mr. Cassady was your chief clerk?

A. Yes, sir.

Q. I presume you had other work besides that, as you have stated?

A. Yes, sir.

Q. When these applicants for positions came up, the work generally was done by Mr. Cassady?

A. Yes, sir.

Q. I don't believe you would see but a very small percentage of the men who came up there for work, or who applied for work, or made out applications?

A. As I testified before, why, it would be only an unusual [fol. 140] case that I saw, that is, if there was anything unusual about it, and if it were necessary to take it up with any officer of the company, I would do that.

Q. Mr. Cassady had charge of the work of hiring the men, unless something occurred in his talk with them, or in their application, that they did not fill it out properly, he would take it up with you?

A. Yes.

Q. That was very seldom?

A. That is right.

Q. And with reference to this pension system Mr. Borum having given his age as thirty-nine——

Mr. Palmer: Twenty-eight.

By Mr. Davis:

Q. —thirty-eight in 1921, when his actual age was forty-nine, before he would be eligible to a pension, he would have to work on the information that he had furnished the

company, eleven years beyond his actual age, so as to have obtained the pension—he has got to be sixty-five to attain eligibility to the pension, wouldn't he?

A. Unless that was discovered, it would be accepted all the way through—unless we find out something to the contrary.

Q. In other words, when he actually became sixty-five on his railroad record, he would appear to be fifty-four, eleven years younger; he would not then be eligible to the pension, would he?

A. Why, we take that record.

[fol. 141] Q. I say, he would not be eligible to the pension at fifty-four?

A. No.

Q. And then, before he would be eligible to a pension under the record that you have, he would have to have an age, so far as you knew, of sixty-five, that is correct, isn't it?

A. Yes, sir.

Q. So that he would have to work for the railroad until he was seventy-six actually before, on his railroad age, as he gave it to you, he would reach eligibility for the pension, that is correct, isn't it?

A. Yes, sir.

Q. So far, then, as the pension was concerned, the giving of the age would be rather a benefit to the company than to him, wouldn't it—delaying by eleven years his right to a pension, that is correct, isn't it?

A. I don't know about that. We want a man to work as long as he is efficient.

Q. Well, I say, you found nothing against his efficiency; it was never called to your attention, after he worked for the company in 1921, did you?

A. I don't know what his record is.

Q. Going back to rule 30, rule 30 is designed to give the company, when an application is made, an opportunity to check it up within thirty days, to pass upon the application?

Mr. Palmer: Article 22.

Mr. Davis: The rule on page 30?

Mr. Palmer: No, article 22, on page 45.

Mr. Davis: That is it, article 22, that is it?

[fol. 142] Mr. Palmer: Yes.

By Mr. Davis (continuing):

Q. "Applications for employment in yard service not rejected within thirty days will be considered accepted," I think refers to that; that rule was for the purpose, of course, that if, within thirty days, the company made an investigation, and found from their records that the man was not satisfactory, that he had made statements that were not true, that would impair his usefulness to the service, that you could then reject his application, that is correct, isn't it?

A. Yes, that is so, but in an investigation, I will tell you that we do not raise the question as to a man's age.

Q. I did not ask you that; I just asked you the purpose of it. Now, then, you have in that application his place of birth, and relatives, so that if you desired to investigate his age, you would have the means of doing it, wouldn't you?

A. Yes, I guess that is right.

Q. If at the end of 30 days you have not rejected his application, he then enters the employment of the company, and cannot be discharged except by having charges pre ferred, and cause shown on a hearing, that is true, isn't it?

A. Yes, sir.

Q. So that for 30 days he would be what you might call, on probation; you would have a right, within those 30 days, to reject his application?

A. I believe so.

Q. So that, at the end of the 30 day period, you would [fol. 143] have no right to reject his application, or to discharge him, except for cause shown in a hearing, that is correct, isn't it?

A. I believe so.

Q. After the end of the 30 day period, he would then retain his status as an employee, unless charges were preferred and a hearing had, and discharged for cause, that is correct, isn't it?

A. Yes, sir.

Q. The charges must be with reference to his work, or violation of the rules, and not with reference to statements made in the application, that is true, isn't it?

A. I don't know as it is.

Q. You never, in all your experience with the Soo Railroad, have known of a single case under the schedule for trainmen, yardmen and conductors, where you attempted to have a hearing because some statement in the application, after 30 days had gone by, was not correct, do you?

A. This case right here.

Q. Will you answer my question. Do you know of any one single case?

A. No, I do not recall it, no.

Q. And at the end of 30 days, this man would have to have a hearing, and cause shown for his discharge, wouldn't he?

A. Yes, sir.

Q. And that hearing would be had, as I understand, with a representative of his organization present to represent him?

[fol. 144] A. I am not familiar with that rule, but only in a general way.

Q. In a general way, you know that that is, I presume, correct?

A. Yes.

Q. The charge that would be preferred against him, would be charges for violating certain rules of the company —you have certain rules, or a rule book——

A. Yes.

Q. (Continuing:) —for failure to perform his work, isn't it?

A. I think it is.

Q. You know of no other information that would enable the railroad company to have a hearing, except those for a violation of the rules, or failure to properly perform his work, that is correct, is it, Mr. Schutt?

A. Yes, as far as I know.

Q. The chief clerk at that time was Mr. Cassady?

A. Yes.

Q. Do you know who was the chief clerk in 1921?

A. Yes.

Q. Who was it?

A. The gentleman sitting over there (indicating).

Q. Was he working under you at that time?
A. No.
Q. He took what you say was Mr. Cassady's place?
[fol. 145] A. Yes, in another office. Mr. Flannigan was assistant to the general manager, and Mr. Pagel was his chief clerk.

Mr. Davis: That is all.

Redirect examination.

By Mr. Palmer:

Q. Upon the taking of these applications, was any investigation made by your department as to whether the man had given his age right or not, his date of birth right?
A. I don't know whether that was gone into or not.

Horace H. Cassady, recalled, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What do you know about that, Mr. Cassady?
A. I don't recall having investigated their age; in fact, if there was a doubt about it, I don't believe we would have accepted his application.

Herman J. Pagel, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. What is your full name?
A. Herman J. Pagel.
Q. And you live here in Minneapolis?
A. Yes, sir.
Q. What is your business?
[fol. 146] A. I am chief clerk in the employment department.

Q. And how long have you been chief clerk in the employment department of the defendant company?

A. Ten years.

Q. Who is the superintendent of employment?

A. We have not any superintendent, but the officer in charge is T. W. Flannigan.

Q. What is Mr. Flannigan's title?

A. Assistant to the vice-president and general manager.

Q. You have been chief clerk there, you say, for 10 years; that would bring you back to 1919?

A. Yes, sir.

Q. What are the duties of chief clerk?

A. To supervise the employment of all classes of help, and employ men, and approve and disapprove all applications for employment, and other various duties.

Q. Is your department the only employment department of the defendant company?

A. Yes; it is the only employment department.

Q. Is anyone else authorized to employ men?

A. Yes, sir.

Q. Who?

A. The division superintendent and the mechanical department, and other heads of departments, all subject to the final approval of the employment department.

Q. Those are all subject to the final approval of the employment department, you say?

[fol. 147] A. Yes, sir.

Q. That is, how then would they employ men, whether temporarily or permanently?

A. They might employ them either way, but the final way would be for the employment department, whether they were temporary or permanent.

Q. It would?

A. Yes.

Q. And do you have, or does your department have authority to reject the employment of men made by these other heads of departments?

A. Yes, sir.

Q. What is the procedure with respect to employing men in your department?

A. Well, it is practically the same as stated by Mr. Cassady. A man comes in and asks for a position, and you ask him several short questions as to his experience, and his

age, and general qualifications, and if that seems to be satisfactory, he is sent to the doctor for a physical examination. If he is qualified, he is returned to whoever has asked for the help.

Q. I call your attention to this Defendant's Exhibit 4 (document submitted to the witness), being this application blank; is that the regular form of application blank that is used in your department?

A. Yes, sir.

Q. And was used in 1921?

A. Yes, sir.

Q. Did you take that application, Mr. Pagel?

A. Yes, sir.

[fol. 148] Q. And how do you identify it?

A. I have signed it here in two or three places (indicating).

Q. These initials, "H. J. P." are yours, are they?

A. Yes, sir.

Q. And the date "10/28/21" means October 28, 1921?

A. Yes, sir.

Q. In having that blank filled out, will you tell us just the procedure as to what is done?

A. We will say, in this case, Mr. Borum came in with a note from the yardmaster, and you let him fill out an application; I evidently handed him one to fill out, and this is it (indicating).

Q. That would be the usual procedure, would it?

A. Yes.

Q. Did you mention or suggest to him in any manner, the way he should fill it out?

A. I just told him to answer all the questions on the blank.

Q. That would be the usual procedure, would it?

A. Yes, sir.

Q. He testified here that you gave him his former application, made in 1911, and told him to fill it out as near as he could, like that; did you do that?

A. No, sir; I don't believe I did.

Q. Why do you say that?

A. I would have no occasion to give it to him.

[fol. 149] Q. You have frequently had men come back and make application for employment the second time, haven't you?

A. Yes, I have had that happen many times.

Q. And in those cases, do you give them their former application?

A. No, sir.

Q. Why not?

A. There is no reason to give it to them.

Q. You just leave it to them to fill out the application themselves, truthfully and correctly?

A. Yes, sir.

Q. When that date was put down there, the age, 39, and date of birth, October 20, 1883, did you accept and rely upon that?

A. Absolutely.

Q. And you believed it to be true?

A. Yes, sir.

Q. And had you known that the true date of birth of the applicant was October 20, 1872, eleven years younger than he stated there, would you have accepted his application?

A. No, sir.

Q. Why not?

A. He would have been over 45.

Q. And at that time, was this rule in full force and effect, that no person inexperienced in railroad work over 35 years of age, and no experienced person over 45 years of age, should be taken into the service—was that rule in effect?

A. Yes, sir.

Q. And that was observed by you?

[fol. 150] A. Absolutely.

Q. Did you have any reason to believe or to think, Mr. Pagel, that his age was eleven years greater than he stated it in this application?

A. No reason at all.

Q. He has stated that you told him to go down and see the superintendent, and Mr. Danforth has testified to his former—well, being found guilty, or having been found violating the liquor rule, and being given a chance to resign; did you have a record of that in your office?

A. Yes, sir.

Q. What was the purpose of sending him to the superintendent, Mr. Curtis?

A. If I did send him down there, it was to have the superintendent's approval of his re-employment, on account of having been mixed up with liquor in 1917.

Q. Would it have any relation to his age, or any question of his age?

A. Why, no; it would not.

Q. Mr. Borum states here that you said to him, "Well, you look too old," when he first came in, is that true?

A. I have no recollection of any such conversation.

Q. Supposing he had looked too old.

A. If he had looked too old, I would have questioned him about his age on here (indicating).

Q. You had his former application before you?

A. Yes, sir.

[fol. 151] Q. Or, as a matter of fact, the record in your office there?

A. Yes, sir.

Q. Do you make, after a man makes an application that way, some investigation, within these 30 days that is permitted by the schedule, or agreement with the trainmen?

A. Yes, sir.

Q. And do you make, in those investigations, any investigation as to whether he has stated his true age or not?

A. No, sir, we do not.

Q. You accept what he has said about that?

A. Yes, sir.

Mr. Palmer: Mr. Davis, would you mind deferring the cross examination of this witness a few moments, until I can put Mr. Wallace on the stand?

Mr. Davis: Oh, surely not.

A. E. Wallace, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. State your name, please.

A. A. E. Wallace.

Q. You live here in Minneapolis?

A. Yes, sir.

Q. And what is your business?

A. Vice-president and general manager of the Soo Line.

Q. How long have you held the position of vice-president [fol. 152] and general manager of defendant company?

A. Since 1925, general manager since 1920; I was made vice-president and general manager in 1925.

Q. Prior to that time, what was your railroad experience?

A. I started railroading in 1902, with the Great Northern, and held various clerical and outside positions, on the staff of the executive officers, until in 1907, and was made trainmaster on the Burlington. In 1911, assistant superintendent on the Burlington; in 1912, superintendent on the Rock Island; in 1918, general superintendent of the Erie; in 1922, general manager of the Soo Line.

Q. Are you familiar, Mr. Wallace, with the practice of the various railroad companies in fixing limits of age at which men shall enter the railroad service?

A. I think so.

Q. And what will you say to that?

A. The general practice is the same as that on the Soo Line. The age for inexperienced help, outside of unskilled labor, is 35; that is, on skilled labor it is 35 for inexperienced help, and 45 years for experienced help.

Q. For inexperienced men the maximum age is 35 years?

A. Yes, sir.

Q. And for experienced men it is 45 years?

A. Yes, sir.

[fol. 153] Q. Is that the general practi-e in all railroad companies?

A. Yes, it is; that is the general practice; that is the general limit.

Q. What is the purpose or reason for these age limits?

A. The purpose is to bring down the average age of the men, in different lines of the service, in order to secure efficient and safe operation, it being felt that the lower your general age is, the better—within these limits prescribed—results in better operation and safer operation.

Q. As to the employment, particularly, of switchmen, what would you say about that, as to the nature of the work?

A. Our employment rules also include a class which covers engine, train and switchmen, requiring that within five years prior to their employment, they must have one year of continuous service with some standard railroad in order to qualify as an experienced switchman. As far as switching in general is concerned, it is probably the most

hazardous job on the railroad; it requires a man to be alert and active.

Q. In general, what are the requirements of a switchman as to physical qualification?

A. A switchman has got to be agile, and must have ability to climb the cars, up and down cars, in all kinds of weather, ride cars, and he is continually in danger, and must be on the lookout for moving cars and engines in his neighborhood, and, of course, he must be very physically fit, [fol. 154] and he must be able to handle himself quickly, and with judgment.

Q. Whether it is recognized in the railroad service that older men—we will say men about middle age—are not as well qualified with that work as the younger men?

A. That is very true.

Q. That is so recognized in good railroad service, is it?

A. It is.

Q. And what is the maximum age at which a man may continue in the service, Mr. Wallace?

A. Under our pension rules, 65 years is the maximum age. At the discretion of the pension board, he may be continued from year to year, the board passing on him every year from the age of 65. After he has passed a physical examination, and is found qualified, then the pension board may continue him to the age of 70 years.

Q. And is this continuation a yearly continuation, after he passes this physical examination?

A. It is.

Q. And what is the purpose of fixing that maximum age of sixty-five years?

A. It is felt that when a man reaches sixty-five, that he is very liable to develop something which might affect his ability physically to continue in his position for the safety of himself and the safety of other employees and passengers.

Cross-examination.

By Mr. Davis:

Q. As I understand it, Mr. Wallace, from forty-five, say [fol. 155] up to sixty-five, you have no age limit; a man starts to work, say, at forty, and he would work on up to sixty-five, if his record was good?

A. Oh, yes.

Q. And the reason for that is that from your experience as a railroad man, and from your general observation, you find that from forty-five to sixty-five, the men go along and do their work generally in good shape?

A. Yes, that is perfectly true.

Q. And you fix the age limit at sixty-five, because after a man has reached sixty-five, you feel that there is, from your experience, and with his added years, a change in his ability to get about and do his work?

A. That is it.

Q. You fix the age at sixty-five with reference to the safety of the men working with him, as well as himself, for the good service of the company, and for the safety of all concerned, is that correct?

A. Yes, that is true.

Q. And, of course, you naturally consider a man above middle age, not as well equipped as a younger man?

A. That is true.

Q. And you have, from your experience, known men who might be older than some men who are agile and alert and strong have you not?

A. That is perfectly true.

Q. Some men grow older much faster than others; we all want to keep young but some of us grow older faster than others?

[fol. 156] A. That is true.

Q. You know from your railroad experience, that many men from forty-five to fifty are as agile and quick and alert in doing the work as men of thirty-five or forty?

A. That is true in some cases.

Q. That is why you fix the age at sixty-five, at which age, from your experience and from your observation—after they go beyond sixty-five, then you feel that for the protection of their own welfare, and the service in general, that they should go out of the service unless they are examined, that is correct, isn't it?

A. Yes, but I might add there, however, that the age limit, on experienced help, of forty-five, was put in more for the reason that we could not hire experienced help, at thirty-five, than it was that we considered the two men equal, the experienced man of forty-five and the inexperienced man at thirty-five.

Q. You consider the experienced man at forty-five as good or better switchman than the inexperienced man at thirty-five?

A. Just the reverse.

Q. You consider the inexperienced man a better man?

A. We consider a younger man, an inexperienced man of thirty-five, better than an experienced man of forty-five.

Q. So that a man without experience you would take at thirty-five?

A. Yes.

[fol. 157] Q. And a man with experience, at forty-five?

A. Yes. Perhaps I did not make myself clear there.

Q. You did not, to me.

A. If we could get younger men, even though they were inexperienced, we would rather have them than experienced men at forty-five. But due to our inability to hire inexperienced men and build them up in our service, it is necessary to get experienced men, men who have had experience on other railroads, and for that reason we raised that age limit, because we could not get experienced men younger than that. We found that was as low as we could get the age limit down, and still secure the men.

Q. As a matter of fact, from forty-five years when they start to work, say at forty-five years, you fix the age limit twenty years beyond that for experienced men, do you not, that is, the retirement age?

A. For inexperienced men and experienced men both.

Q. You don't hire inexperienced men that are over forty-five or just forty-five—they have to be thirty-five and under?

A. Yes, but the retirement age is the same.

Q. But the inexperienced man starts to work at thirty-five years or under?

A. Yes.

Q. So he has got a thirty-year working period before retirement for old age?

A. Yes.

[fol. 158] Q. You fix, for a man who has had experience on other railroads, or on your railroad, a maximum of forty-five years, and he has then, when he starts to work, at least twenty-year working period, in which you consider him fit for service and able to work, before you retire him on account of his age; that is true, isn't it?

A. Yes.

Q. And you do that because of your experience as a practical railroad man, in connection with your idea of their ability to work, and general operation of the railroad, that is correct, isn't it?

A. Yes, sir.

Redirect examination.

By Mr. Palmer:

Q. What is the fact as to the primary rule being to get men as young as you can, provided they have arrived at an age where they are safe and efficient?

A. I do not understand your question, Mr. Palmer.

Q. For illustration, if a man presents himself for employment, and he is an experienced switchman of forty-five years, and another man presents himself for employment, and he is an inexperienced switchman of twenty-eight, which man would you take?

A. The man at twenty-eight.

Q. Why?

A. Because we feel that he would give us much better service.

[fol. 159] Q. And when you say "better service," what do you mean?

A. More efficient, that is, it would result in much more efficient operation, and safer operation, with a younger man.

Q. What will you say as to the general age level of employees; what is your object in these employment rules?

A. The object is to keep the average age of the employees just as low as possible.

Q. This pension system that has been referred to here, pensioning a man after sixty-five years; what is the purpose of the pension system?

A. The pension system, I would say—that is, one of the important reasons for putting in the pension system is to encourage the employes to stay with you and to get his loyalty towards the company. And probably equally as important as that, is the fact that when an employee reaches the point where he cannot perform his duties, due to old age or some physical or mental disability, why, he can be retired, and will not become a burden upon the community,

and he has some means for support. Our pensioners are very loyal and feel that they owe something to the company, and they are a great asset to the railroad.

Q. As I understand you, the primary purpose to be served is to keep down the age limit as low as possible, and then provide for the retirement of the men as soon as it is thought that they have reached the age at which they are not safe and efficient; and then the pension system is simply [fol. 160] to ameliorate the hardship of compulsory retirement?

A. That is true.

Recross-examination.

By Mr. Davis:

Q. Mr. Wallace, you say your pensioners are loyal; are not your men loyal, too?

A. Yes, that is perfectly true; but, if we should turn a man out at sixty-five, or sixty-eight, because he had some disability, without some provision to take care of him, we do not feel that he would be a loyal employee; we feel that he would be liable to think that he was unjustly dealt with, that he could still work further years, and he would not be as loyal, of course, as if he were supported by the pension system of the company.

Q. You feel the same way, Mr. Wallace, do you not, as to men who are injured in the service?

A. Yes.

Q. That they should be justly treated, so that their loyalty might be obtained?

A. Yes.

Q. When a man has reached sixty-five years, you have a provision that he can continue to work five years longer, by examination and approval of some officer of the company?

A. By the Pension Board, yes.

Q. That is, if you make up your minds that he is capable of doing the work, so as to give him employment, your policy is to keep him loyal, and well satisfied, I presume, is it not?

A. That is true.

[fol. 161] HERMAN J. PAGEL, recalled, testified as follows:

Direct examination (continued).

By Mr. Palmer:

Mr. Palmer: I have another question to ask this witness on direct examination.

Mr. Davis: All right.

Q. It has been brought out here, that at the age of sixty-five years, a man is retired, unless he passes an annual physical examination, and is kept on by the Pension Board; that is correct, is it?

A. Yes, sir.

Q. How do you check up, or keep track of the employees, having reached that age; do you have charge of that?

A. Yes, sir.

Q. You have charge of keeping account of that?

A. Yes, sir.

Q. You keep a record of that, do you?

A. Yes, sir.

Q. How do you do that?

A. From these applications.

Q. Do you go by anything else?

A. No, sir.

Q. You don't ask anybody, as to what talk they have had with other employees, or anything of that sort?

A. No, sir.

Q. You rely solely upon these applications?

A. Yes, sir.

Q. They remain a matter of permanent record in your office?

[fol. 162] A. Yes, sir.

Q. And just how do you do that; how do you keep this check on the age limits?

A. In addition to this record, we keep a book record, with the name and the occupation, and the date of birth, and the date of employment, and other information, and every so often, say every two or three years, we check over the book, and make a note of every man who is sixty years or over, and in that way we catch sixty-one, sixty-two, sixty-three, and sixty-five, and so forth. Then we draw up a list of

those who are sixty-five, according to our records, and check the men up.

Q. From what do you make up this book?

A. From the applications.

Q. The records in your office?

A. Yes, sir.

Q. Do you use anything else?

A. No, sir.

By Mr. Joyce:

Q. Mr. Pagel, I notice on the back of both of these applications, there is what purports to be a record of other employments on the part of the applicant that made it, here (indicating).

A. Yes.

Q. What investigation or consideration do you give to that record, beyond its mere appearance on the back of the application itself?

A. We do not give any consideration to this, only in so far as it gives us a lead to check it up; everything on here is investigated, that is, on the book.

[fol. 163] Q. You do check all this?

A. We check up the book—well, for instance, we ask for a five-year record—I don't believe it is on that one (indicating); on this new one, it asks for a five-year record. If a man shows seven or eight years, we may skip the first two years on that, and only check the last five, but the last five are checked up and investigated.

Q. Again, with reference to this rule, in respect to the thirty days so-called probation period——

A. (Interrupting.) Yes, sir.

Q. (Continuing:) —what is the nature of the investigation that you indulge in during that period; that is only to determine whether the probation is going to mature into constant employment, or whether the man is going to be let off at the end of the thirty days?

A. The past record of employment is checked.

Q. Nothing else but what is on the back here (indicating)?

A. That is all.

Q. Do you attempt to check it all, or investigate in any manner any of the answers that are made in the body of the application itself?

A. Not unless perhaps we have been tipped off that his age is more than what it shows; then we may go into it.

Q. In the light of your experience in the employment bureau, do you know of, or is it a general practice of the men, giving an age other than their actual age, for the purpose of employment on the Soo Line?

[fol. 164] A. On the Soo Line?

Q. Yes.

A. I believe I will have to have that again.

(Previous question read.)

A. That is a general question, is it?

Q. Yes. Are you familiar, or is there such a practice, to your knowledge, of the men, in an effort to escape the rigor, possibly, of the limitation of forty-five years?

A. I believe there is; I think it is quite general.

Q. With your knowledge of that being quite general, what consideration do you give to that factor, as to possibly questioning the application of any employee who comes along, who you know is not a young man?

A. For instance, we get applications from every man that is hired on the Soo Line, the entire system. Those that I do not hire myself, it is just a case of paper. With the men that I employ myself, I have got to use my own judgment, as to whether he looks the age that he shows on his application. If he does not, he won't get by. If there is any question in my mind as to whether his age is more than what he claims, I will probably go into it.

Cross-examination.

By Mr. Davis:

Q. Mr. Pagel, in respect to this question that Mr. Joyce asked you—how long had you been the employing officer there at the Soo Line before 1921?

A. It is about ten years that I have been handling this, [fol. 165] but I have been employing men for probably seventeen years.

Q. For the Soo Line?

A. Well, yes, on and off.

Q. This practice which Mr. Joyce asked you about, of men giving younger ages when they were old, and older

ages when they were young, you knew it existed practically all the time that you have worked for the Soo Line?

A. I know it is a general practice, yes.

Q. On Mr. Borum coming in there, you did send him to the superintendent, didn't you?

A. I could not say for sure, but from the record I have, I believe I did.

Q. From the record you have?

A. Yes. Meaning by that, that his record showed that he had worked here before, and had been mixed up in drinking, and I would not put him to work before the superintendent's approval of it.

Q. Would you say, that Mr. Borum is correct, then, in saying that when you talked with him, you told him he would have to go and see the superintendent?

A. I believe that would be so, yes.

Q. All right. Mr. Borum testified when he came up with a slip from the yardmaster and handed it to you, that you took out some files and looked them over, is that correct?

A. Undoubtedly it is, yes.

Q. When you looked these files over, will you now swear that you did not tell to Mr. Borum, "You look too old; you [fol. 166] had better go and see the superintendent"?

A. I have no recollection of telling him anything of the kind.

Q. You hire hundreds of thousands of men, don't you, in the course of ten years?

A. Yes, sir.

Q. You don't remember the conversation that you have with every man, do you?

A. Certainly not.

Q. You heard the yardmaster testify yesterday, that his reason for going to the superintendent for employing Mr. Borum was because of drinking liquor?

A. Yes.

Q. That he denied that he had talked with Borum about his age—that Mr. Borum talked with him about his age?

A. Yes.

Q. Will you now swear that Mr. Borum did not say to you, when you told him he looked too old, that he told you his railroad age was thirty-nine?

A. I will swear, to the best of my knowledge and belief, I did not tell him any such thing.

Q. Do you recall everything you said and talked with him?

A. I don't recall everything I said to him.

Q. But you do know now that after talking with him, whether it was about his age or about his drinking, you sent him to the superintendent?

A. I would not say that I did send him to the superintendent, but the indications are that I did, for the reason [fol. 167] that he was mixed up with drinking.

Q. You would not swear now that you are certain that you did not talk with him about his age?

A. I could not swear about any conversation that took place ten years ago.

Q. Or seven years ago?

A. Or seven or eight years ago.

Q. It may be correct, then, that Mr. Borum is correct when he said that you sent him to the superintendent, on account of his age. You can answer that yes or no.

A. No.

Q. You cannot?

A. No.

Q. Now, haven't you answered this question in this way, that you knew of this practice that younger men gave older ages in order to get employment, and older men gave younger ages in order to get employment; I understand that in spite of that knowledge, when you received an application from a man, you would look at him, and if you made up your mind that he was beyond or under the age, that you made no effort to check up the statement as to his age, is that correct; is that the system that you adopted on the Soo Line?

A. I believe I said, that if he showed, on his application, like in this case, thirty-nine years, and if he, in my opinion, was of that age, I would not do anything further about it.

Q. You would not do anything further about it?

A. I took that application to be correct.

[fol. 168] Q. You took it to be correct, in spite of the fact that the application shows a younger age, and that you knew of the practice and custom with many men on the Soo Line, to give ages younger than they were?

A. I did not say on the Soo Line; by general practice—I did not specify the Soo Line.

Q. It includes the Soo Line?

A. It includes all railroads.

Q. It included the Soo Line, didn't it, the same as the other railroads?

(No answer.)

Q. (Continuing:) You know that that is the general practice in this northwest territory, and that is where you have been working for the last seventeen years——

A. Yes, sir.

Q. (Continuing:) —for men to give ages younger than they are, when seeking employment on the railroad?

A. I would not say that I know it is the practice; I believe it is an understanding.

Q. Didn't you state to Mr. Joyce that that is a practice that you knew existed among the railroad men, to a large extent, and it was a practice?

A. I think it is done every day, yes.

Q. You think it is done every day?

A. Yes.

Q. In spite of the fact that you knew that—and you knew it, of course, in 1921, while you were in that department?

A. Sure.

[fol. 169] Q. In spite of the fact that you knew that, as I understand you, you had made no investigation with reference to his age, had you?

A. I would have no occasion to.

Q. You made no investigation as to his age?

A. I did not make any investigation.

Q. You knew, and know now, and knew then, that from this application, where the man's place of birth, and the relatives and dependents were given, that you had a ready, convenient and reasonably swift means, within thirty days, to ascertain his age, if you wanted to, didn't you?

A. We do not make a practice of ascertaining the ages.

Q. I am not asking you that. I say, from this application, which he handed you, you had at hand a ready, quick and adequate means of finding out his age, if you had wanted to inquire, within thirty days, couldn't you?

A. Providing that the information he gave me there, as to his place of birth and the other information, would be correct, I would, yes.

Q. Yes, and you made no inquiry of that kind about his age at all, did you?

A. No, sir.

Q. And you have adopted that practice, when the age is given by an employee, to accept that age, in spite of your knowledge of the fact that there is a practice and understanding in this section of the country for men to give younger ages than they have, isn't that correct?

A. I made no investigation of his age at all.

[fol. 170] Q. Then to my question you would answer, "Yes," would you not; that is correct, is it not?

A. Yes, sir.

Q. You know, from your employment in employing men, that if you had made an investigation of his age within thirty days, and found out that his age was more than forty-five, you would then have the right to reject his application, would you not?

A. Within thirty days, yes.

Q. You would have the right to put the man out of the employment of the company?

A. Yes, sir.

Q. That would be because, if you found he made a misstatement as to his age or any other matter that was not true, that you would have the right to discharge him?

A. Yes.

Q. At the end of the thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. He would be immune from discharge on anything in connection with the application.

Q. On anything in connection with his application?

A. Yes, sir.

Q. As I understand it, at the end of thirty days, his status as an employee of the railroad company would become fixed, and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. Yes, sir.

[fol. 171] Q. But before that thirty days, he could lose his employment because of statements made in the application?

A. Yes, sir.

Q. At the end of the thirty days, he could not lose his status as an employee of the Soo Line Railroad Company, except for a violation of the rules, or failure to perform his work, and on charges preferred and a hearing had, that is correct, isn't it?

A. Yes, that is right.

Q. If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. I presume so.

Q. And you made no effort to do that?

A. No, sir.

Q. With reference to his employment—in 1917 he gave you a statement that he was working as a switchman for the Great Northern, and that he was discharged, and he wrote it right down there (indicating)?

A. I think so.

Q. So that you knew that less than five years before that, he had been discharged from the Great Northern Railroad?

A. Yes, sir.

Q. Did you make any investigation of that matter at all?

A. Yes, sir.

Q. Did you find out that he was discharged because he [fol. 172] was too old?

A. No, I did not.

Q. Did you find out what he was discharged for?

A. He was discharged for—well, let me see—(witness hesitating). I believe he was discharged by the Great Northern for drinking; I cannot say offhand right now.

Q. As to whether he was discharged for drinking, you cannot say?

A. It is either the Great Western or the Great Northern; there are two on there; it is one of the two.

Q. That shows that he quit the Great Western.

A. Then he was discharged from the Great Northern for drinking.

Q. You ascertained that after you had had his application?

A. Yes, sir.

Q. After ascertaining that, after you had his application, you allowed him, so far as you were concerned, to enter the employment of the Soo Line, or to continue in the service of the Soo Line Railroad?

A. Yes, sir.

Q. You ascertained that before the end of the thirty days, of course?

A. Yes, sir.

Q. Having ascertained that, you still allowed him to continued as an employee of the Soo Line Railroad, and let the thirty days go by?

A. Yes, sir.

[fol. 173] Q. Did you investigate five years back the places that he had worked at?

A. Yes, sir.

Q. You ascertained, and got the application for employment, I presume, or whatever facts you could, from them?

A. Yes, sir.

Q. Did you get the applications for employments from the people that he had worked for, for five years previous?

A. I got his record from them.

Q. That includes the application for employment?

A. No, it does not.

Q. Did you get this (indicating) from the—the Dupont people, is it—did you get that from them?

A. I never saw that before.

Q. You don't know where that came from?

A. No, sir.

Q. Did you make inquiry of his employment of the Dupont people at Washburn, Wisconsin, in 1918?

A. Yes, sir.

Q. Did you then make any effort to ascertain what age he gave when he entered that employment?

A. I believe I told you before that we don't check up the record of the age.

Q. Will you answer the question: Did you make any effort to ascertain what age he gave there?

A. No, I did not.

Q. From your experience, you know that where men are [fol. 174] employed, both in the railroads and in large industries, that the men fill out applications, you know that, don't you?

A. Maybe not and maybe yes.

Q. You know that that is the general practice, don't you?

A. It is with large corporations.

Q. The Dupont Company is reasonably large, you know that?

(No answer.)

Q. Now, knowing that, you know that in these applications, that these men do give their age as well as other information?

A. No, I don't know anything about it.

Q. Well, don't you know—well, we will go to the railroad list; you know that with the railroads they give their age in the applications?

A. Yes, sir.

Q. All right, so that you have down here (indicating)—having the information that he had worked for the Great Western and the Great Northern, you would have obtained from the Great Northern, within forty-eight hours, if not twenty-four hours, his previous application with the Great Northern, which would show the age that he gave?

A. Yes.

Q. Ascertain what age he gave?

A. Yes, sir.

Q. You made no effort to do that, did you?

A. I believe it was mentioned here yesterday as to what age he gave the Great Western.

Q. I did not ask you that. Did you make any effort to [fol. 175] 1921 to investigate that?

A. I think I have told you four or five times that we do not investigate ages.

Q. Did you make any effort to ascertain what age he gave in 1921, when he made this application (indicating), from the Great Northern?

A. No, I did not.

Q. That answers the question. When you say that you know, in response to Mr. Joyce's question, that it is a quite common practice for men to give ages either younger or older than they are, I will ask you if it is not a fact that, as Mr. Borum has testified, that is what is known generally among you people, as a man giving his railroad age?

A. No, I don't know anything of the kind.

Q. You don't know that?

A. No, sir.

Q. You never heard of a railroad age before in your life?

A. No, I did not hear of it before, until yesterday.

Redirect examination.

By Mr. Palmer:

Q. Is there, in railroad employment, any such thing as a distinction between railroad age and the true age?

A. I never heard of it until yesterday.

Q. And you say you have heard of the custom of railroad men to falsify their ages?

A. Yes, sir.

Q. Is that simply general hearsay information?

A. General hearsay, that is all.

[fol. 176] Q. Has it any connection with your records that you keep in your office there, in the department?

A. None whatever, no sir.

Q. Has it any connection with the applications that you take from the men themselves——

A. No, sir.

Q. (Continuing:) —in their own handwriting, and have them sign it?

A. No, sir.

Q. Do you assume that those are correct?

A. Absolutely. That is all we have got to go by.

Q. And you rely upon that?

A. Yes, sir.

Q. Is it the man's appearance which is the only means that you have of knowing whether he is telling you the truth or not?

A. That is about all I could go by.

Q. If he did look older, what would you do?

A. Then I would question him very closely about his age.

Q. In this case, you had his former application?

A. Yes, sir.

Q. That showed him to be under the age of forty-five at the time he was employed?

A. Yes, sir.

Q. Under the age of forty-five; in fact, well under the age of thirty-five?

A. Yes, sir.

Q. Had you any reason to think or suspect that he was falsifying about his age?

A. Not at all.

Q. Do you take into account, in taking these applica-

[fol. 177] tions and relying upon them, this practice of railroad men in falsifying their ages?

A. I don't take account of anything but what he puts down in his own handwriting. That is all I go by.

Recross-examination.

By Mr. Davis:

Q. When you say, in response to Mr. Palmer's question, that the only means you have is what he puts into his statement, you don't mean that; you had other means of readily ascertaining his age, from the application, didn't you, if you had made inquiry?

A. That is what I told you, that we don't do it.

Q. Just answer the question; I know you understand it. But you had means available of readily ascertaining out of his statement, what his age was?

A. Yes, sir.

Q. Both in his statements with the railroad companies and with the Dupont people, that is correct, you had that means?

A. Yes.

Q. That is, you had the means at hand to inquire of his previous employers that he gave you in his application?

A. Yes.

Q. You had the means readily available, to inquire from them, and to ascertain from them, whether he had given his age to these employers, and what age that was, that was readily available?

A. I don't know whether it was or not.

Q. It was available?

[fol. 178] A. I would say so, so far as the railroad company is concerned.

Q. It was readily available so far as the railroad company is concerned?

A. If I had got it from them, it would have been the same as we have it here (indicating).

Q. I wish you would kindly answer the question that I ask you, without volunteering anything which is not responsive to the question that I ask you. Isn't it a fact, that you did have at hand a ready and convenient means of checking up this man's age from other railroads, by whom he had been employed, if you had seen fit to do so?

A. Yes, sir.

Q. Isn't it a fact that at the time this application was made, that, as you have stated before, you were aware of the practice and custom of men giving younger ages than

their actual age, when they have come there and made application, that that is true of the railroads in this northwest country?

A. That was just a matter of hearsay.

Q. But it is a matter that you know of, you have said?

A. Indirectly, yes.

Q. You knew that was being done; you knew that was a fact?

A. No, I did not know it was a fact; I said I believe it was an understanding.

Q. Didn't I ask you again a little while ago, and didn't you state to Mr. Joyce—if that was a practime that you knew of, and didn't you say, "Yes"; isn't that true, Mr. Pagel?

[fol. 179] A. The reporter has got my answer.

Q. I will ask you again if that is not so?

A. I say, it is an understanding with the men, as a general proposition they lie about their ages, yes.

Q. Didn't you state to Mr. Joyce that it is a practice that you knew of?

A. I don't remember whether I said it was a practice that I knew of. I believe—well, I understand there is, anyway; that is as near as I can make it.

Q. That is what you understood in 1921, as well as you do now?

A. I would not say, as well as I do now; I know more about it now.

Q. You testified that you had that understanding in 1921, that is true—isn't that true?

A. Yes, sir.

Q. If you did not know, from your experience on the Soo Line, and your own experience, that there have been applications where the ages have been younger than the men themselves; isn't that a fact? With all these applications that you have taken, certainly you knew of that fact, didn't you?

Mr. Palmer: Will you confine it to prior to 1921?

By Mr. Davis:

Q. All right. Prior to 1921; you had had charge of employing men then prior to that time?

A. In the last ten years I have had it.

Q. That would be 1919?

A. Yes, sir.

[fol. 180] Q. Do you recall of the superintendent calling you up with reference to Mr. Borum's working, or sending you a slip?

A. No, I don't.

Q. Do you keep those slips?

A. I don't know, sometimes, and sometimes not; it depends; I might throw them in the basket.

Q. These slips sometimes contain a statement of the superintendent as to fact regarding the applicant, do they not?

A. Oh, no, not that; no, I did not have reference to what the superintendent said.

Q. Mr. Borum said that he went to see the superintendent, that you sent him there, and told him that you thought he was too old, and that he had better go and see the superintendent; you say that you don't remember of that conversation, and you swear that it did not take place. Now, then, assuming, for the purpose of my question, that you did have this conversation and sent him to the superintendent, and he went to the superintendent, and told him about this matter, the superintendent would then either 'phone you or give him a slip?

A. Yes, sir.

Q. But you don't know which he did?

A. No.

Redirect examination.

By Mr. Palmer:

Q. Would you send an applicant, in the usual course of your work, over to the superintendent about anything with respect to his age, the age of the man?

[fol. 181] A. Would I send him to the superintendent?

Q. Yes.

A. No, I would not.

Q. Did the superintendent have anything to do with his age?

A. No, sir.

Q. In respect to this matter, as you say, the practice of men to lie about their ages, did you, or have you checked up on that, to ascertain, or had you up to 1921, whether it was a fact or not that they lied about their ages?

A. No, sir.
Q. You simply assumed that what they stated was true?
A. Yes, sir.

Recross-examination.

By Mr. Davis:

Q. You do know that frequently, or at least occasionally the superintendent is hard pressed for men to do the work, when they are short of men, don't you know that?
A. I will have to let the superintendent answer that.
Q. I say, you know, from your experience in hiring men, that in the fall of the year the yards are congested, and frequently they are in need of men?
A. In the fall of the year we are more pressed for men than we are at any other time.
Q. You frequently see, when the wheat shipments in harvest time come in here, in September, October and November, that the yards are somewhat congested?
[fol. 182] A. Yes, sir.
Q. Don't you know, from your experience in employing men, that there have been occasions when the superintendent has asked for men to work who were older than the age limit?
A. For temporary work, yes.
Q. Don't you know that you have taken applications from men who were over the age limit, who gave their ages less than the age limit?
A. No, I would not say that.
Q. Since 1921, and up to the present time, then, as I understand it, you have not adopted a policy on the Soo Line any different than you had in 1921, as to the men's age, have you?
A. No, there has been no change.
Q. Up to the present time you have made no effort, so far as your employment bureau is concerned, of checking up the ages of other men, other than Mr. Borum?
A. No, sir.
Q. You have allowed all of the men on the Soo Line to continue as employees in their work, and they do work for the railroad company up to the present time at least, up to today, without making any effort to check up their ages, to see whether they are correctly given or not, is that correct?

A. No, that is not correct. If I have any reason to doubt their age, if I have any suspicion of their age, I will check it up.

Q. Yes, but I say, outside of you yourself having any suspicion of their age, it is the policy of the Soo Line Railroad, so far as the employing of these men and the reten-
[fol. 183] tion of the men now on duty is concerned, that has been the same as it was before, as to investigating their age, hasn't it?

A. It has been the same since 1921. That is as far as I can speak for.

Q. No change in your policy of investigating the men's age at all?

A. No, sir.

Q. You have known, I presume, of the claim made here by the Soo Railroad, as to the difference in this man's age, for at least three months, have you not?

A. I don't know about that.

Q. What is your best judgment on that?

A. I think Mr. Palmer will have to answer that; I don't know.

Mr. Davis: That is all.

Redirect examination.

By Mr. Palmer:

Q. When did you first find out the truth about his age?

A. It is since the injury.

Q. Was it since the suit was brought by Mr. Borum for this injury?

A. That would be within the last couple of months.

Q. This month, is it?

A. Yes.

Q. Prior to the time that Mr. Borum brought this suit, that the amended answer was interposed, had you any knowledge or information as to the falsity of this age that had been submitted by him?

[fol. 184] A. No, sir, none at all.

Q. So far as you know, did anybody connected with the company have any such information?

A. No, sir.

Now, you say "temporary work"; if a man puts down his true age, advising you that he is over the age, you say he might be employed for temporary work in times of stress for men, what do you mean by that, Mr. Pagel?

A. Well, if a man comes in and wanted a job, and I asked him how old he was, and he said, "I am fifty years old," if he could pass the doctor's examination, I would put him to work temporarily, but I would put him out inside of thirty days.

Q. What do you do in a case where a man, for instance, discloses his true age, and he is over age, and you employ him for these thirty days, how do you handle his application in that case?

A. I put it to one side, and within thirty days—I take probably the twenty-ninth day—it has to be within thirty days—I would take him out of the service.

Q. And there was nothing in this case done here, or suggested?

A. No, sir.

F. W. Curtis, sworn, testified as follows:

Direct examination.

By Mr. Palmer:

Q. State your full name.

A. F. W Curtis.

[fol. 185] Q. You live here in Minneapolis?

A. Yes, sir.

Q. Your business?

A. Assistant to the general superintendent of transportation.

Q. How long have you held that position?

A. A year and nine months.

Q. Prior to that, what position did you hold?

A. Terminal superintendent.

Q. With the defendant railroad company?

A. Yes, sir.

Q. What terminal?

A. Twin City Terminal Division.

Q. That includes the city of Minneapolis and the Shoreham yards, as well as St. Paul?

A. St. Paul also, yes, sir.
Q. And how long did you hold that position?
A. Two years.
Q. And prior to that time?
A. Divisional superintendent.
Q. Of what division?
A. The Wisconsin and Peninsular Division.
Q. Does that include Shoreham yards?
A. It did at that time.
Q. How long did you hold that position?
A. Upwards of 20 years.
Q. So you were division superintendent of the division including the Shoreham yards here in Minneapolis in both 1911 and 1921, Mr. Curtis?
A. Yes, sir.
Q. The plaintiff, Mr. Borum, has testified here to his having been sent to see you by Mr. Pagel, at the time he made [fol. 186] this application in 1921, the latter part of October, October 28, 1921; do you recall specifically that visit?
A. No, sir.
Q. What, in the ordinary course and practice, would be the reason for the employment department sending a man to you, Mr. Curtis?
A. In connection with the man's previous record and cause for dismissal.
Q. If he had been theretofore dismissed?
A. Yes, sir.
Q. Would he be sent to you for anything with respect to his age?
A. No, sir.
Q. Why not?
A. The division superintendent is not concerned in the matter of age.
Q. Has he any authority with respect to the age of the employees?
A. No, sir.
Q. The plaintiff testified that he came to you and said that he had come to apply to you for a job as switchman, and that the clerk in the employment department told him, "He was too old," and that you asked him what his age was, and that he said to you, "My railroad age is 39"; have you any recollection of any such conversation?
A. No, sir.

Q. In the ordinary course and practice, would you have any such conversation with the men?

A. I don't think so.

Q. Why?

[fol. 187] A. Because there would be no reason for it.

Q. If he had—if a man did speak to you in regard to his employment, using the words "railroad age," what would you have done?

A. I should not have paid any attention to it.

Q. Did you ever hear of the distinction between the railroad age of a man and his true age?

A. No, sir. That is the first I have heard of that term.

Q. Is there any such distinction made in railroad practice, railroad work, as far as the officers and heads of the operating departments are concerned?

A. No, sir.

Cross-examination.

By Mr. Davis:

Q. Mr. Curtis, do you recall the yardmaster there coming to see you and talking with you about Mr. Borum's reemployment?

A. No, I do not.

Q. He may have?

A. Possibly.

Q. And you have forgotten it?

A. Possibly.

Q. You have forgotten, of course—I presume the yardmaster does sometimes speak to you about the reemployment of men?

A. Yes.

Q. It would be rather difficult for you to recall the different conversations years ago?

A. No, I would not be able to.

[fol. 188] Q. You have no recollection now, as I understand it, of Mr. Borum coming to see you?

A. No, sir.

Q. You have no recollection of a conversation with him?

A. No, sir, I have not.

Q. That is all you know about this matter?
A. Yes, sir.

Mr. Davis: That is all.
Mr. Palmer: That is all.

JOHN E. PALMER, being first duly sworn on oath, testified as follows:

I am the general attorney for the defendant company, and have been for nearly ten years continuously last past.

I have had charge of this litigation growing out of the injury to the plaintiff. An action was brought by the plaintiff against the defendant company in June, 1929, to recover for the injury which is here involved.

I personally interposed an answer in the case, and in the original answer this defense of misstatement of age of the plaintiff was not set up, for the reason that I had no knowledge of it, and did not ascertain that there was any such circumstance. I had asked for the service record of the plaintiff prior to the interposition of this answer, and it showed the date of his birth to be October 20, 1883.

Later, and just prior to the interposing of the amended answer, I had noted in the file that after the plaintiff's in- [fol. 189] jury, and while he was being cared for by the chief surgeon, that the chief surgeon had a note that the plaintiff had stated to him, after the injury, that his age was fifty-five.

I therefore took up the matter of investigating what this plaintiff's true age was, and with the assistance of attorneys at Winchester, Illinois, the county seat of Scott county, Illinois, access was finally had to the information contained in the family record, in the family Bible——

Mr. Davis: May the record show that this entire statement of counsel is taken subject to objection, as incompetent, irrelevant and immaterial, and has nothing to do with the issues in the case, and is self-serving.

Mr. Palmer (continuing:) —and it was then ascertained that the true date of his birth was October 20, 1872, whereupon, on August 19, 1929, the amended answer was interposed, and that defense set up.

Mr. Davis: No cross examination.

Mr. Joyce: Is there any more evidence.

Mr. Palmer: No, there is not.

Mr. Joyce: The record may show that the testimony is closed, and the hearing is adjourned until the 14th of October, 1929, at ten o'clock A. M., at Room 1708, First National-Soo Line Building, Minneapolis, Minnesota, at which time further proceedings will be resumed.

Arguments had before arbitrators October 17th, 1929.

[fol. 190] In District Court of Hennepin County

Award of Arbitrators

We, the undersigned, Matthew M. Joyce of Minneapolis, Minnesota, Harry S. Stearns of St. Paul, Minnesota, and John P. Devaney of Minneapolis, Minnesota, the arbitrators agreed to in that certain agreement of submission to arbitration herein under Chapter 81, General Statutes, Minnesota, 1923, and dated the 17th day of September, 1929, do certify that the above entitled matter was originally heard on October 3rd and 4th, 1929, and then adjourned until the 14th day of October, 1929, which date was thereafter found inconvenient for the interested parties, and the matter was thereupon by informal agreement continued until the 17th day of October, 1929, at which time proceedings were resumed, arguments had and the cause submitted; and we do make and submit the following findings of fact and conclusions of law to the District Court of Hennepin county, Minnesota, after consideration of the pleadings and the evidence submitted on behalf of plaintiff and defendant.

In District Court of Hennepin County

Findings of Fact

We find:

1. That the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the defendant herein, is a railway cor-

poration engaged in interstate commerce, having its principal office and place of business at Minneapolis, Minnesota.

2. That the plaintiff, James M. Borum, suffered injury resulting in the loss of both legs below the knee while act-[fol. 191] ing as a switchman in the yards of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company on the 11th day of December, 1928.

3. That the circumstances of the infliction of said injury were such as to make a jury question as to the negligence of the defendant, its agents or servants, proximately causing or contributing to said injury. On this issue of negligence we find for the plaintiff.

4. That suit for said injury was duly brought under the Federal Employers' Liability Act, as shown by the pleadings on file herein, and that the status of the said plaintiff as to his being an employee within the meaning of the act is in controversy herein; that if not an employee of the defendant within the meaning of said act and entitled to its benefits and privileges, he has no cause of action against the defendant.

5. That the defendant has paid to the plaintiff, irrespective of the question of its legal liability in the premises, the sum of twelve thousand five hundred dollars ($12,500) on account of said injury, and that the plaintiff may retain said sum irrespective of the decision herein on the merits and legal questions involved.

6. That plaintiff, James M. Borum, was employed by the defendant, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, in the year 1921, and was thereafter at all times up to and including December 11, 1928, an em-[fol. 192] ployee of said defendant within the meaning of the Federal Employers' Liability Act.

7. That the true name of the plaintiff was, and is at all times here under consideration, James M. Borum.

8. That in October, 1921, plaintiff was forty-nine years of age. That in said month and year he sought employment of the defendant and in his written application for employment he gave his age as thirty-eight years, knowing such statement to be untrue.

9. That the evidence relied upon by the plaintiff as to the knowledge possessed by the defendant of plaintiff's age at the time plaintiff sought employment was so unsatisfactory as bearing upon the question of estoppel, that the arbitrators have been unable to make any finding thereon.

10. That the plaintiff submitted to the usual medical examination prescribed by the defendant and was found to be in good health and acceptable physical condition.

11. That neither his age nor the physical condition of the plaintiff contributed to his injury.

12. That the work performed by the plaintiff for the defendant was satisfactory.

13. That there was in effect throughout the term of the plaintiff's employment with the defendant a contractual agreement and schedule between the defendant company and various organizations of defendant's employees, section 22 of which reads as follows:

[fol. 193] "Applications for employment in yard service not rejected in thirty days will be considered accepted,"

to the benefits of which plaintiff was at all times during his employment entitled.

14. That the plaintiff was not rejected within the thirty day period mentioned following his entry into service, and that thirty days after entering defendant's service the status of the plaintiff became fixed as an employee and he was immune from discharge on anything in connection with the application.

15. That at the time plaintiff was employed and throughout the period of his employment with the defendant, defendant company had a rule known as No. 16 which provides among other things that:

"No person inexperienced in railroad work over 35 years, and no experienced person over 45 years, shall hereafter be taken into the service."

16. That at the time plaintiff was employed and throughout the period of his employment with the defendant, defendant company had a rule in connection with its pension system known as No. 4 (A), which provides that:

"All officers and employees who have attained the age of 65 years shall be retired; provided, however, that the pension board with the approval of the president, shall have power to retain in the service any officer or employee who has reached the age of 65 years, if in their opinion it is in the interest of the company so to do, but such retention in [fol. 194] the service shall not extend beyond the period when such officer or employee shall have attained the age of 70 years."

Conclusions of Law

The arbitrators are of the opinion, in view of the foregoing determinations of fact, and therefore conclude as a matter of law, that the plaintiff, James M. Borum, was, thirty days after his entry into service of the defendant company in 1921 and at all times thereafter up to and including the 11th day of December, 1928, an employee of the defendant company within the meaning of the Federal Employers' Liability Act. That both parties were at the time and place of the accident, on said date sustained by the plaintiff, engaged in interstate commerce, and that by virtue of the injuries sustained by the plaintiff while in such employ of the defendant, he is entitled to recover from and of the defendant the sum of twelve thousand five hundred dollars ($12,500) in addition to the sum of twelve thousand five hundred dollars ($12,500) heretofore voluntarily paid by the defendant company to the plaintiff. That the defendant pay the accrued costs and expenses of this arbitration. And such constitutes the finding and award of the arbitrators herein.

Dated at Minneapolis, Minnesota, this 23rd day of October, 1929.

Matthew M. Joyce, Harry S. Stearns, John P. Devaney, Arbitrators.

[fol. 195] In District Court of Hennepin County

Notice of Motion to Recommit

To the above plaintiff and Messrs. Davis, Michel & Yaeger, his attorneys:

You will please take notice, that on Saturday, the 9th day of November, 1929, at 10 o'clock in the forenoon, or as soon

thereafter as counsel can be heard, defendant will move said court, the Honorable Mathias Baldwin, judge thereof, at the court room of said judge, in the court house at Minneapolis, said county and state, to open, examine and hear the findings and award of the arbitrators herein, made and filed in said court on the 23rd day of October, 1929; and upon the same and the transcript of testimony and all files, records and proceedings herein, defendant will further move the court for an order re-committing said matter to said arbitrators with directions to make and return to said court additional and more full and explicit findings upon the following matters, to-wit:

1. Whether plaintiff understood, at the time of making the written application for employment referred to in finding number 8, that defendant had a rule or practice against accepting men over 45 years of age as employees in its train service operations.

2. Whether plaintiff, at the time of making such application for employment, knew he was ineligible as an applicant for employment in switching service under the rules or practice of defendant and whether he made the untrue statement of his age for the purpose of securing such employ-
[fol. 196] ment in disregard of such rule or practice.

3. Whether plaintiff made, at the time of making such application for employment, a knowingly false statement of his age to defendant's chief examining surgeon and whether the same was relied on by the surgeon in issuing for plaintiff a certificate of physical fitness required by defendant of employees entering its train service.

4. Whether defendant gave plaintiff employment as a switchman upon the basis of plaintiff's said application and medical examination and whether said application and medical examination were a regular and essential part of securing employment with defendant under its rules and practices.

5. Whether defendant had the purpose in adhering to the rule referred to in finding number 15, of promoting safety and efficiency in its railway operations.

6. For such other additional findings or amendments as the court shall deem necessary or proper in the premises.

Dated November 1, 1929.

John E. Palmer, James L. Hetland, 1427 First Nat'l-Soo Line Bldg., Minneapolis, Minnesota, Attorneys for Defendant.

Service admitted Nov. 1, 1929.
Davis, Michel & Yaeger, Attorneys for Plaintiff.

[fol. 197] In District Court of Hennepin County

Order Granting Motion to Recommit—Filed Dec. 9, 1929

This is a motion by defendant to re-commit the above entitled matter to the arbitrators with directions to make and return to the court additional and more explicit findings upon certain matters set forth in the notice of motion. The same came on to be heard by and before the undersigned, one of the judges of the said court, on November 30, 1929, pursuant to adjournment, Messrs. John E. Palmer and James L. Hetland appeared as counsel for defendant in support of said motion, and Messrs. Davis, Michel & Yaeger appeared for the plaintiff in opposition thereto.

Said motion was heard and submitted upon the findings and award of the arbitrators made and filed October 23, 1929, the transcript of the testimony taken before the arbitrators, all files, records and proceedings herein, and the arguments of counsel. Upon due consideration of all of the same it is

Ordered, that the motion of defendant be granted and said matter is hereby re-committed to the arbitrators and said arbitrators are hereby directed to make and return to this court, with all convenient speed, additional and more full and explicit findings upon the following matters, to-wit:

1. Whether plaintiff understood, at the time of making the written application for employment referred to in finding number 8, that defendant had a rule or practice against accepting men over 45 years of age as employees in its train service operations.

[fol. 198] 2. Whether plaintiff, at the time of making such application for employment, knew he was ineligible as an applicant for employment in switching service under the rules or practice of defendant and whether he made the untrue statement of his age for the purpose of securing such employment in disregard of such rule or practice.

3. Whether plaintiff made, at the time of making such application for employment, a knowingly false statement of his age to defendant's chief examining surgeon and whether the same was relied on by the surgeon in issuing for plaintiff a certificate of physical fitness required by defendant of employees entering its train service.

4. Whether defendant gave plaintiff employment as a switchman upon the basis of plaintiff's said application and medical examination and whether said application and medical examination were a regular and essential part of securing employment with defendant under its rules and practices.

5. Whether defendant had the purpose in adhering to the rule referred to in finding number 15, of promoting safety and efficiency in its railway operations.

Dated November 30, 1929.
By the Court:

Mathias Baldwin, Judge.

[fol. 199] In District Court of Hennepin County

Supplemental Findings to Award of Arbitrators

This matter having been referred to the undersigned arbitrators pursuant to an order bearing date of November 30, 1929, by the Honorable Mathias Baldwin, judge of the District Court of Hennepin county, Minnesota, for further findings as specified and set forth in the said order; and the arbitrators having conferred and given heed to the direction of the court, and considering the record do make and find as follows:

1. With reference to the matters set forth in paragraph No. 1 on the second page of the court's order, the arbi-

trators find that the plaintiff, at the time of making the written application referred to for employment, understood that the defendant had a rule or practice against accepting men over forty-five years of age as employees in its train service operation.

2. With reference to the matters set forth in paragraph No. 2 of the court's order, the arbitrators find that the plaintiff did not know that he was ineligible as an applicant for employment in switching service under the rules or practice of the defendant; and we further find from the evidence that it was a general practice for men over forty-five years of age to state their age as being under forty-five years when seeking employment of the defendant, and that the defendant was aware of such practice and that men [fol. 200] over forty-five years had been employed by defendant in temporary service; and we further find that the plaintiff made the untrue statement of his age for the purpose of securing employment in disregard of the rule or practice heretofore designated as rule No. 16.

3. With reference to the matters set forth in paragraph No. 3 of the court's order, the arbitrators find that at the time of the plaintiff's making his application for employment to the defendant he made a knowingly false statement of his age to the defendant's chief examining surgeon, and that the same was relied upon by such surgeon as one of the factors considered by him in determining his conclusion with reference to issuing a certificate of physical fitness required by the defendant of employees entering its train service.

4. With reference to the matters set forth in paragraph No. 4 of the court's order, the arbitrators find that the defendant gave plaintiff employment as a switchman on the basis of plaintiff's application and medical examination, and further find that such application and medical examination were a regular and essential part of securing employment of the defendant under its rules and practices.

5. With reference to the matters set forth in paragraph No. 5 of the court's order, the arbitrators find that the purpose of the defendant in promulgating its rule referred to in finding No. 15 was to promote safety and efficiency in its railway operation.

[fol. 201] Dated at Minneapolis, Minn., February 7, 1930.
Respectfully submitted.

Matthew M. Joyce, Harry S. Stearns, John P. Devaney, Arbitrators.

MEMORANDUM

With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that the record shows that the following testimony was given by the plaintiff: "They were liable to hire me over the age limit, which they have done," and that the record further showed the defendant's witness Pagel had testified that the practice of men giving erroneous ages in order to obtain employment was one which was being "done every day" and was a general practice "in this northwest territory" with reference not only to the defendant but to other railroads as well—we could not find that the plaintiff knew he was "ineligible as an applicant for employment." We assume anybody could apply for employment and would be eligible to seek the same. This eligibility of the applicant could mature into a regular employment even though he were over forty-five years old, if the defendant elected to waive or modify its rule. Having made the rule, the defendant could, of course, waive, change or abrogate it. While being eligible as an applicant, nevertheless under the rule enforced, he would be ineligible as an employee. We regard a substantial difference existing between one's eligibility to apply [fol. 202] for employment and one's eligibility as an employee under a rule such as here existing where the same is enforced.

IN DISTRICT COURT OF HENNEPIN COUNTY

NOTICE OF MOTION FOR AN ORDER ACCEPTING AND CONFIRMING AWARD

To the above-named defendant and to Messrs. John E. Palmer and James L. Hetland, attorneys for defendant:

You will please take notice, that on Saturday, the 15th day of March, 1930, at 10 o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, the above

named plaintiff will move the court, before the District Court in chambers, in the city of Minneapolis, Hennepin county, Minnesota, for an order accepting and confirming the award of the arbitrators herein made and filed in said court on the 23rd day of October, 1929, and the supplemental findings and award of said arbitrators herein made and filed in said court on the 7th day of February, 1930, and for an order for judgment in accordance therewith.

Dated this 6th day of March, 1930.

Davis, Michel & Yaeger, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

Service admitted March 7, 1930.

John E. Palmer, James L. Hetland, Attorneys for Defendant.

[fol. 203] In District Court of Hennepin County

Notice of Motion to Vacate Award of Arbitrators

To James M. Borum, designated as plaintiff, and to his attorneys, Messrs. Davis, Michel & Yaeger:

You will please take notice, that on Saturday, the 15th day of March, 1930, at 10 o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the court house in the city of Minneapolis, county of Hennepin, state of Minnesota, defendant will move the court for an order vacating and setting aside the award of the arbitrators in favor of plaintiff dated and filed herein on October 23, 1929, on the following grounds:

1. The conclusions of law and award are contrary to law.

2. The conclusions of law and award are contrary to the findings of fact and the evidence.

3. Original finding number 6 that plaintiff was an employee of defendant within the meaning of the Federal Employers' Liability Act is contrary to the evidence, other findings of fact and the law.

4. Error in the conclusions of law and award in holding that plaintiff was an employee of defendant within the meaning of the Federal Employers' Liability Act notwith-

standing the evidence and findings of fact that he knowingly misrepresented his age to be 38 years when in truth it was 49 years (original finding number 8) for the purpose of securing employment in disregard of (supplemental finding number 2) defendant's rule and practice not to take into its train service men over 45 years of age (original [fol. 204] finding number 15), such rule or practice being known to plaintiff (supplemental finding number 1) and established to promote safety and efficiency in defendant's railway operations (supplemental finding number 5), whereby plaintiff obtained and held such employment through fraudulent means and deception and setting at naught a reasonable rule and practice of defendant established to promote the safety of its employees and to protect commerce, said fraud being directly opposed to the public interest because calculated to embarrass and hinder defendant in the performance of its duties and to defeat the purpose of the Federal Employers' Liability Act to promote the safety and efficiency of railway operations.

5. Error in the conclusions of law and award in holding that plaintiff was an employee of defendant entitled to the benefit of the Federal Employers' Liability Act notwithstanding the evidence and finding of fact that he misrepresented his age as aforesaid to defendant's chief examining surgeon and that such misrepresentation was relied on by said surgeon (supplemental finding number 4) in certifying that plaintiff was qualified as required by defendant's rules for admission to employment in its train service, by which misrepresentation plaintiff set at naught defendant's reasonable rule and practice not to admit to such service men over 45 years of age, established for the promotion of safety and protection of commerce as aforesaid, plaintiff's said misrepresentation being in direct opposition to the [fol. 205] public interest as aforesaid.

6. Error in the conclusions of law and award in holding that plaintiff was an employee of defendant entitled to the benefit of the Federal Employers' Liability Act notwithstanding that the evidence required a finding that defendant gave plaintiff employment as a switchman in reliance on his false statements to defendant of his age, as being 38 years when it was in truth 49 years, and that defendant did not know until after plaintiff's injury that such statement so

made by him were false, the same being made by him for the purpose of securing such employment, in knowing disregard of defendant's rule against accepting men over 45 years of age as employees in its train service, which rule and practice was established by defendant to promote the safety of its employees and to protect commerce, plaintiff's said fraudulent setting at naught thereof being directly opposed to the public interest, as aforesaid.

7. Error in original finding number 14 and in the conclusions of law in holding that plaintiff was immune from discharge by defendant for misrepresenting his age as aforesaid at the end of 30 days from his entry into its service and in holding that such supposed immunity conferred on plaintiff the benefit of said act, notwithstanding his said fraudulent action in direct opposition to the purpose of the act and the public interest as aforesaid.

8. Error in not finding that defendant was not liable to plaintiff under the Federal Employers' Liability Act for the reasons aforesaid.

[fol. 206] 9. You will further take notice that at said time and place defendant will move the court to find that defendant was at all material times a common carrier by railroad engaged in interstate commerce; that plaintiff was engaged in such commerce for defendant at the time he sustained his injury here in question; that plaintiff was not at such time an employee of defendant within the meaning of the Federal Employers' Liability Act and was not entitled to the benefits and privileges of that act; that by reason thereof plaintiff has no cause of action against, and is not entitled to recover from, defendant for his said injury; and to order judgment that plaintiff take nothing by this proceeding.

Said motion and each part thereof will be made upon the arbitration agreement, the transcript of the testimony, the exhibits, the findings and award, both original and supplemental, and all the files, records and proceedings herein.

Dated March 7, 1930.

John E. Palmer, James L. Hetland, Attorneys for Defendant.

Service admitted March 7, 1930.

Davis & Michel, Attorneys for Plaintiff.

IN DISTRICT COURT OF HENNEPIN COUNTY

HEARING

The above entitled cause having been regularly placed upon the special term calendar of this court, came on for [fol. 207] hearing before Hon. Gunnar H. Nordbye, one of the judges of said court, on the 18th day of March, 1930; Messrs. Davis, Michel & Yaeger appearing as attorneys for the plaintiff; Messrs. Henry S. Mitchell, John E. Palmer and James L. Hetland appearing as attorneys for the defendant, and the following proceedings were had:

Mr. Michel: I think maybe I better make a statement for the record first, Your Honor. This is the matter of James M. Borum, plaintiff, against the Minneapolis, St. Paul & Saulte Ste. Marie Railway Company, defendant, and I want to make a rather formal statement, which I think counsel will agree with, before I state the facts to Your Honor. James M. Borum, if Your Honor please, while in the employment, as a switchman, for the defendant, was injured under circumstances making it a jury question as to whether his injury was the proximate result of defendant's negligence. The defendant was an interstate carrier, and at the time Borum was injured he was employed by defendant and was engaged in interstate commerce, if he was an employee within the meaning of the act.

Mr. Palmer: The Federal Employers' Liability Act.

Mr. Michel: The Federal Employers' Liability Act. To adjust a dispute between the parties, an arbitration agreement, under Chapter 81, General Statutes of Minnesota for 1923, was duly entered into, and said arbitration agreement was signed by the plaintiff and defendant and by their respective counsel, and said arbitration agreement is on file [fol. 208] with the clerk of this court; that following the signing of said arbitration agreement the abritrators duly met on the 3rd and 4th days of October, 1929, that is, the arbitrators named in said arbitration agreement, and again on the 17th day of October, 1929, to consider the matter set forth in said arbitration agreement; that said arbitrators duly heard said cause and heard all witnesses and all testimony offered and adduced by both parties; that said testimony was offered and received in the presence of both parties, and both parties were fully represented at all times during the taking of evidence in said proceeding, and that

counsel for both parties were duly permitted to, and did, present arguments for and in behalf of their respective clients, the parties herein; that the testimony so taken and all proceedings had in said arbitration matter were duly reduced to writing, as appears from the transcript of the testimony in said matter, which transcript is on file with the clerk of this court; that following the receipt of such evidence and the arguments of counsel, and consideration thereof and deliberation by the arbitrators, certain findings of fact and conclusions of law were made and entered into, wherein and whereby the arbitrators unanimously found in favor of the plaintiff on all the issues submitted to them, as more fully appears from the written report and findings of said arbitrators, dated October 23, 1929, which said report is on file with the clerk of this court; that following the making and filing of said report of said arbitrators, the [fol. 209] defendant made a motion to re-commit said matter to the arbitrators, and said motion was dated November 1, 1929; that said motion was duly heard by the Hon. Mathias Baldwin, one of the judges of the above named court, which said original motion is on file with the clerk of this court; that upon said motion to re-commit, the court, by said Hon. Mathias Baldwin, one of the judges thereof, did, on the 30th day of November, 1929, duly make an order recommitting said matter to said arbitrators for further findings therein, and said order is now a part of the record herein and is on file with the clerk of this court; that after said matter had been so re-committed to said arbitrators, and after due consideration by them, an order was duly made by the arbitrators, dated February 7, 1930, wherein and whereby the original award herein was affirmed, with some additional findings, as appears from said order, and that said order, being the supplemental order, is now on file with the clerk of this court; that following the filing of said order of the arbitrators under date of February 7, 1930, the plaintiff, on the 6th day of March, 1930, duly made and caused to be served a notice of motion to affirm the award of said arbitrators, and application for judgment thereon, which notice of motion is on file with the clerk of this court; that on the 7th day of March, 1930, the defendant duly made, and thereafter served, a notice asking that the award of the arbitrators be vacated and set side on various grounds, the same being substantially that the award was [fol. 210] contrary to law and fact and contrary to the evi-

dence and the proper construction thereof, as appears from said notice, which is on file with the clerk of this court; that the matter now comes before the court for determination upon plaintiff's motion to confirm the award and for judgment, and upon defendant's motion to set aside the award; that the arbitrators acted in good faith in said proceedings and in the exercise of an honest judgment; that there is no question of fraud or partiality on the part of the arbitrators herein, and that said arbitration proceedings were in all things fairly and honestly conducted. Now, Mr. Palmer, any suggestions?

Mr. Palmer: With respect to the statement that in the original award or the supplemental award the arbitrators found in favor of the plaintiff on all the issues submitted, we do not concede that, Your Honor.

Mr. Michel: That may be understood, that said arbitrators found for the plaintiff as appears from the original and supplemental findings of the arbitrators.

Mr. Mitchell: Strike out "on all the issues."

Mr. Michel: Just the words "on all the issues." Yes, it may be understood that the words "on all the issues" in the statement of counsel that the findings were in favor of the plaintiff on all the issues may be amended by saying that the finding was for the plaintiff as appears from the supplemental finding and award.

Mr. Palmer: No objection to that, your Honor. We agree. [fol. 211] Not as a supplemental award confirming the original award. There is nothing said in the report of the arbitrators about that, that is, in the supplemental award they simply answer the questions that were put to them by the court—they make further findings.

Mr. Michel: It may be understood that the statement of Mr. Palmer is correct. Other than that, Mr. Palmer, are the facts as given to the reporter now substantially correct?

Mr. Palmer: Yes. I would like to have it appear, if your Honor please, that Mr. Henry S. Mitchell appears as one of counsel for the defendant.

Mr. Michel: I might state, if the court please, the matter will be heard upon the records as given to the reporter. I do not believe there is anything further for the reporter.

Mr. Palmer: I think not.

(Argument.)

IN DISTRICT COURT OF HENNEPIN COUNTY

DECISION AND ORDER

The above entitled matter having been regularly placed upon the special term calendar of this court, came on for hearing before the undersigned, one of the judges of the above named court, on the 18th day of March, 1930, on a notice of motion in behalf of defendant to vacate the award of the arbitrators and on a notice of motion in behalf of the plaintiff for an order accepting and confirming the award [fol. 212] of the arbitrators, both of said motions being heard on the above date; Messrs. Harry S. Mitchell and John E. Palmer appearing in behalf of the defendant in support of said motion to vacate, Messrs. Davis, Michel & Yaeger appearing in behalf of plaintiff in support of said motion to accept and confirm. The court having heard the arguments of counsel and upon the transcript of the evidence and exhibits submitted to said board of arbitrators and all the files and records herein,

It is hereby ordered, that the award of the arbitrators made and filed herein on the 23rd day of October, 1929, and the supplemental findings and award of said arbitrators made and filed herein on the 7th day of February, 1930, be and the same are hereby in all things confirmed by this court.

It is further ordered, that judgment be entered in favor of the plaintiff and against the defendant in accordance with the original and supplemental findings and award of the arbitrators herein.

Dated June 19, 1930.

By the Court:

Gunnar H. Nordbye, Judge.

Stay of 60 days.

IN DISTRICT COURT OF HENNEPIN COUNTY

MEMORANDUM—Filed June 20, 1930

Clearly the court has jurisdiction to determine whether or not the award of the arbitrators is contrary to the law

and the evidence. This is a statutory arbitration and is not [fol. 213] governed by the rules of a common law arbitration.

However, after due consideration, the court is constrained to confirm this award. The court has doubt that the so-called 30 day probation rule is sufficient in itself to prevent defendant from raising the question as to the status of the plaintiff as an employee entitled to the benefits of the Federal Employers' Liability Act. It does, however, appear from the testimony of two of the defendant's witnesses that the defendant company construed this rule to mean that plaintiff would be immune from discharge on anything in connection with the application for employment after the 30 day period had expired. It may well be argued that this interpretation is merely the opinion of two employees of the company, and is not conclusive as to the reasonable interpretation of that rule which should be given by this court.

This court would rather rest its confirmation of the award on the finding that the plaintiff was an employee of the defendant company and entitled to the benefits of the Federal Employers' Liability Act.

The only decision that seriously questions this conclusion in the so-called Rock case, depended upon by the defendant to deny this plaintiff any legal right of recovery. Clearly this court must recognize the authority of that case, and if a reasonable interpretation thereof is decisive against the plaintiff, this award must be vacated. It may not be amiss, however, to state, in considering the Rock case, that all fraud does not render a contract void ab [fol. 214] initio. The result of fraud in the relationship of master and servant is to be governed substantially by the same well-recognized principles of fraud that apply generally to the various relationships of life. The general purposes of the Federal Employers' Liability Act and the rights of employees thereunder do not change or modify this well-known principle. Generally and in the large majority of transactions fraud merely renders a contract voidable, and it is not void except at the instance of the innocent party. The result in the Rock case may well be justified on account of the nature of the fraud practiced by Rock, as a result of which there was no meeting of the

minds of the two contracting parties. Rock was denied employment on account of his physical condition, but later, by virtue of his fraud a-d deception, the railway company was induced to give him employment when in truth and in fact, by his fraud, it was led to believe that it was giving employment to an entirely different person. The fraud practiced strikes at the very vital elements of the contract of employment, to-wit, the identity of the person hired. True, he continued in the employment of the railway company for some time thereafter, but did so by the fraud practiced which had theretofore rendered the contract of employment void.

It is inconceivable to this court that Justice Butler intended to hold in the Rock case that every fraudulent violation of the rules framed for maintaining a certain standard of safety and efficiency of the employees would render such [fol. 215] employment void and deny the defrauding employee any rights under the act. It seems quite clear that any fraud practiced by the plaintiff herein at the most rendered the contract voidable. It was not void. The minds of the parties met. On account of the general practice of railroad men falsifying their ages in order to obtain employment—which was well known to the defendant company—the plaintiff may not have known that he was thereby ineligible as an applicant for employment. The rule that was promulgated by the company could be modified or waived by it. However, the defendant company intended to hire the man that it did give employment to. He applied in person and was examined by a physician who pronounced him physically fit to work as a switchman. Men over forty-five years of age were being retained as switchmen by the defendant company, and it is safe to assume, with a retiring age of sixty-five, that a majority of the men, or at least a very large number of the men, who were employed as switchmen were over forty-five years of age. If the plaintiff had commenced working for the defendant as an experienced switchman before he was forty-five years of age, his employment at the time of the accident would have been considered wholly in accord with the rules promulgated to promote efficiency and safety. In other words, any fraud practised by plaintiff had no direct effect at the time of the initial employment or at the time of the

accident upon the safety of other employees or upon the safety of the public at large. He was a competent em- [fol. 216] ployee. There is no claim that there was any relationship between the alleged fraud and the happening of the accident. His individual employment as a switchman at his age, while a violation of the rules framed for the general object of efficiency and safety, would in theory only be inconsistent with and contrary to the general purposes of the Federal Employers' Liability Act. The defendant company had by the same rules concluded that the employment of men between the ages of forty-five and sixty-five as switchmen was entirely in harmony with the duty that defendant owed to the employees and to the public within the spirit and intent of the said act.

Plaintiff's status as an employee was not a peril to defendant's patrons or to its other employees, and there are not circumstances connected with his fraud that would render a right of recovery herein abhorrent to public policy.

Let this memorandum be made a part of the foregoing order.

Nordbye, J.

In District Court of Hennepin County

Stipulation Settling Case

It is hereby stipulated by and between James M. Borum and the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the parties to the arbitration proceedings herein and respectively designated as plaintiff and defendant, that [fol. 217] the foregoing and annexed proposed case is conformable to the truth and contains the arbitration agreement entered into by the parties and to which is annexed the pleadings in the court action for which this proceeding was substituted, all of the testimony adduced, and proceedings had, before the arbitrators, and all other facts and information submitted to the arbitrators and to the trial court; together with the findings of fact, conclusions of law and award of the arbitrators, the additional and supplemental findings of the arbitrators, the motion of plaintiff

to confirm, and of defendant to vacate, the award of the arbitrators, the order and decision of the trial court, and the reasons therefor, and all proceedings had upon said arbitration and upon the trial of said cause; except that the exhibits of the respective parties are not included therein, but that all exhibits offered or received in evidence shall be taken and deemed a part of the settled case herein; that the same and all thereof may be settled, allowed and certified by the Honorable Gunnar H. Nordbye, the judge who heard and tried said case, as the settled case herein, without further notice.

Dated September 8, 1930.

Davis, Michel & Yaeger, Attorneys for James M. Borum. H. S. Mitchell, John E. Palmer, James L. Hetland, Attorneys for Minneapolis, St. Paul & Sault Ste. Marie Railway Company.

[fol. 218] In District Court of Hennepin County

Certificate of Trial Court

Pursuant to stipulation by counsel for the parties to the arbitration proceedings herein, and the same having been examined by me and found conformable to the truth, I hereby certify that the foregoing and annexed case is conformable to the truth and contains the arbitration agreement entered into by the parties, to which is annexed the pleadings in the court action for which this proceeding was substituted, all of the testimony adduced, and proceedings had, before the arbitrators, and all other facts and information submitted to the arbitrators and to the trial court; together with the findings of fact, conclusions of law and award of the arbitrators, the additional and supplemental findings of the arbitrators, the motion of plaintiff to confirm, and of defendant to vacate the award of the arbitrators, the order and decision of the trial court, and the reasons therefor, and all proceedings had upon said arbitration and upon the trial of said cause; except that the exhibits of the respective parties are not included therein, but that all exhibits offered or received in evidence shall be taken and deemed a part hereof and a part of the settled

case herein; and the same and all thereof is hereby settled and allowed as the settled case in said cause.

Dated September 8, 1930.

Gunnar H. Nordbye, District Judge.

[fol. 219] In District Court of Hennepin County

Judgment—August 21, 1930

The above entitled action having been duly heard and tried before arbitrators selected by and agreed upon by the parties to the above entitled action, and said arbitrators having, on the 23rd day of October, A. D. 1929, duly made and caused to be filed their findings and award in favor of the plaintiff and against defendant in the sum of twelve thousand five hundred ($12,500.00) dollars, and said matter having been, upon the application of the defendant, resubmitted to said arbitrators, and said arbitrators having, on the 7th day of February, A. D. 1930, duly made and filed supplemental findings and award upholding and confirming the original award made by said arbitrators.

Thereafter, upon application duly made by the defendant, the above named court having made and filed its order denying defendant's motion to vacate the award of said arbitrators, and said court, upon the motion of plaintiff, having made an order in all things confirming the award and findings of said arbitrators and confirming the supplemental findings and award of said arbitrators, and having ordered that judgment be entered in favor of plaintiff and against the defendant upon and pursuant to the original and the supplemental findings and award of said arbitrators.

Now, therefore, on motion of Davis, Michel & Yaeger, attorneys for the above named plaintiff, it is hereby adjudged that, pursuant to the order of the court herein, plaintiff do [fol. 220] have and recover from the defendant the sum of thirteen thousand one hundred twenty-four and 91/100ths ($13,124.91) dollars and clerk's fees in the sum of two dollars ($2.00), amounting in the whole to the sum of thir-

ten thousand one hundred twenty-six and 91/100 dollars ($13,126.91).

By the Court.

Geo. H. Hemperley, Clerk of District Court, by W. A. Carlson, Deputy.

In District Court of Hennepin County

Notice of Appeal to the Supreme Court

To the above-named plaintiff and to Messrs. Davis, Michel & Yaeger, attorneys for said plaintiff, and to George H. Hemperley, clerk of said District Court:

Please take notice, that defendant Minneapolis, St. Paul & Sault Ste. Marie Railway Company hereby appeals to the Supreme Court of Minnesota from the judgment rendered, entered and docketed in the above entitled action on August 21, 1930, in favor of plaintiff and against defendant in the sum of thirteen thousand one hundred twenty-six and 91/100 dollars ($13,126.91); and from the whole of said judgment. In connection with its said appeal said defendant makes and specifies the hereto annexed assignments and specifications of error, which it avers occurred in the entry [fol. 221] of said judgment and in the proceedings had and taken prior to and leading up to the same; upon which errors defendant will rely for a reversal of said judgment, in addition to all other assignments of error appearing in the record herein.

Dated September 10, 1930.

Henry S. Mitchell, John E. Palmer, James L. Hetland, Attorneys for Defendant, 1427 First Nat'l-Soo Line Building, Minneapolis, Minnesota.

In District Court of Hennepin County

Assignments of Error

Defendant, deeming itself aggrieved by the judgment entered in the above entitled action on the 21st day of

August, 1930, in said District Court in favor of plaintiff and against defendant, in connection with its appeal to the Supreme Court of Minnesota from said judgment, does hereby assign and specify the following errors, which it avers occurred in the entry of said judgment and in the proceedings had prior thereto, upon which errors, in addition to all other assignments of error shown by the record herein, defendant relies for reversal upon this appeal.

I

The court erred in ordering a recovery by plaintiff upon rights asserted under the Federal Employers' Liability Act, 35 Stat. 65, as amended by 36 Stat. 291, in that the findings [fol. 222] of fact made by the arbitrators and confined by the court establish that plaintiff was not an employe of defendant within the meaning of said act nor entitled to the benefits thereof nor to any recovery thereunder.

II

The court erred in not granting defendant's motion to vacate, and in confirming and ordering judgment upon, the award of the arbitrators under the Federal Employers' Liability Act as amended for injuries sustained by plaintiff while acting as a switchman for defendant, in that the findings of fact which the arbitrators made and the court confirmed (particularly Original Findings 8, 15, Supplemental Findings 1, 2, 5) establish that plaintiff in his application to defendant for employment knowingly misrepresented his age as 38 years when it was in fact 49 years; that such application by plaintiff and his physical examination was the basis on which defendant permitted plaintiff to act as a switchman; that plaintiff's purpose in such misrepresentation was to obtain employment in disregard of defendant's rule or practice, which he knew, not to take men over 45 years old into its train service; and that the purpose of this rule or practice was to render defendant's railway operations safe and more efficient—such being also the purpose of the Federal Employers' Liability Act.

III

The court erred in confirming the arbitrators' original finding No. 14 and their conclusion of law to the effect that

plaintiff, notwithstanding his fraud of the scope established [fol. 223] by the arbitrators' other findings of fact, was nevertheless entitled to the benefits of the Federal Employers' Liability Act as amended, by virtue of an agreement between defendant and organizations of its employee that applications for employment not rejected in thirty days would be considered accepted.

IV

The court erred in ordering recovery by plaintiff upon rights asserted under the Federal Employers' Liability Act as amended, in that the evidence conclusively establishes that plaintiff was not an employe of defendant within the meaning of said act nor entitled to the privileges thereof nor to any recovery thereunder.

V

The court erred in not granting defendant's motion to vacate, and in confirming and ordering judgment upon, the award of the arbitrators under the Federal Employers' Liability Act as amended, in that the evidence conclusively establishes, in addition to the findings of fact made by the arbitrators and confirmed by the court, that defendant permitted plaintiff to act as a switchman in reliance on his false statements of his age and did not know until after his injury that such statements were false.

VI

The court erred in not granting defendant's motion to find that plaintiff was not an employe of defendant within the meaning of the Federal Employers' Liability Act as amended and was not entitled to the benefits and privileges [fol. 224] of that act and to order judgment that plaintiff take nothing by this proceeding, for the reason that such requested findings and order were required by the arbitrators' findings of fact, which the court confirmed, and by the evidence.

VII

The court erred in holding the conclusions of law and award of the arbitrators to be not contrary to law.

VIII

The court erred in holding the conclusions of law and award of the arbitrators to be not contrary to the findings of fact and the evidence.

In District Court of Hennepin County

Waiver of Appeal Bond

Defendant in the above entitled action being desirous of appealing to the Supreme Court of Minnesota from the judgment entered in said action on the 21st day of August, 1930, in favor of plaintiff and against defendant, in the sum of thirteen thousand one hundred twenty-six and 91/100 dollars ($13,126.91); plaintiff herein does hereby specifically waive the giving of a bond by defendant on said appeal, and agrees that said appeal may be taken and all proceedings stayed and superseded in like manner as though a supersedeas bond were given as required by statute.

Dated September 10, 1930.

Davis, Michel & Yaeger, Attorneys for Plaintiff.

Service admitted by Davis, Michel & Yaeger, attorneys for plaintiff, and by Geo. H. Hemperley, Clerk of District Court, Hennepin County, September 10, 1930.

[fol. 225] Defendant's Exhibit 1

(Italics indicate matter appearing in handwriting.)

Form 3868 3M 10-28 J

No. —

Minneapolis, St. Paul & Sault Ste. Marie Railway Co.

Application for Employment

Applications for employment will be made on this form by such classes of employees entering the service as have been and may be designated hereafter, and a medical examination required covering certain occupations.

A fee of $3.00 will be charged for the medical examination, the applicant's proportion being $1.50 which will be refunded if disqualified.

Upon satisfactory completion of all required papers and examinations, the applicant will be allowed to enter the service on probation, providing there is need of his services, but shall not be considered as an employee until the application is finally approved. Applicants under 21 years of age must furnish a Minor's Release on Standard Form.

1. Full name of applicant: *James Monroe Borum.* (Write given and middle name in full.)
2. Employment desired: *Switchman.*
3. Age: *28.*
4. Date of birth: *Oct. 20, 1883.*
5. *Scott Co. Ill.*
6. Where born: ——.
7. Married? *Single. 1019-28 Ave. N. E. Mpls.*

[fol. 226] 8. If married, give name and address of wife and names and ages of children: (City, street and number) ——.

9. Names of parents, if living: P. O. address of parents (City, street and number): ——.

10. If parents are dead, give name and degree of nearest relative: *Miss Della Borum and Mrs. Fanny B. Patient,* (City, street and number) *527 17th St. Rock Island, Ill.*

11. Names and addresses of any persons dependent on you for support or to whose support you are contributing: *Miss Della Borum and Mrs. Fanny B. Patient,* (City, street and number) ——.

12. Have you ever made application to the M. St. P. & S. S. M. Ry. Co. before? *No.* In what capacity? ——. At what place? ——. Date entered service: ——. Date left service: ——.

13. Have you now or did you ever have a law suit with any railroad company or any one else? *No.*

14. Have you ever before made application for employment and been subjected to physical examination? *No.* When? ——. Where? ——. Name of Doctor? —— ——. Accepted? ——. Rejected? ——. Cause? ——.

15. Do you use intoxicating liquors? *No.*

16. Have you any physical ailment or defect which might render you unfit for railway service? (Give particulars) ——.

[fol. 227] 17. State fully as to any physical injury or operation performed. In consideration of employment by

the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, in addition to the foregoing statements, I hereby declare that I am not addicted to the use of intoxicating liquors, that I will not use them while on duty and at no time to an excessive degree, that I have been informed of the character of the employment I am about to undertake and of the duties connected therewith, that I have been notified that there are numerous bridges, buildings, tunnels, stand-pipes, stock yard chutes, mail cranes, platforms, coal chutes, overhead wires and viaducts, and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree, in consideration of my employment, to familiarize myself with the same and use due care for my safety without further notice from the Railroad Company, and I accept notice from said Railroad Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car or engine, and that I am to use constant care for my safety in working about same. Under no circumstances will I go between moving cars or engines to open or adjust couplings or for any other purpose, and in the event that it is necessary for me to go into the yards of other companies, I understand and agree that I must exercise the same care as when employed in the yards or on the property of the Minneapolis, St. Paul and Sault Ste. [fol. 228] Marie Railway Company.

I also agree to examine and know for myself that the ways, works or machinery connected with or used in my employment are at all times in safe and proper condition, and agree to give immediate notice in writing to some person superior to myself in the serivce of the Company of any defect in the condition of ways, works or machinery connected with or used in my employment, and if I continue to use such ways, works or machinery with a defect or defects therein, I agree to assume the risk of an accident as a risk incident to my employment, and hereby waive the provisions of any kind and all statutes or laws with respect thereto.

In consideration of my employment by said Company, I further agree that whenever I shall sustain any personal injury while in the service of said Company I will allow its surgeons and any medical examiners it may select to exam-

ine my person and body as often as the Company may deem necessary in respect to the alleged injury, and I hereby waive all objections to such surgeons or medical examiners testifying whenever called upon by the Company, and I further agree that my refusal to allow any such examination to be made or testimony to be given shall be a bar to the institution or prosecution of any action on account of such injuries, and any action pending at the time of such refusal shall at once abate in consequence thereof. And in the event of any suit or action against said Company for injuries received, I hereby agree for myself, assigns, heirs, [fol. 229] administrators or executors, in consideration of my said employment, that any physician or surgeon who may have attended or examined me may testify as to all facts in his knowledge, whether derived from the confidential relation of physician and patient or not, and I waive all objections to such physicians or surgeons so testifying.

(Signed) *James Monroe Borum.*

Permanent address (City, street and number): *1019 28 Ave. N. E., Mpls. Minn.*

(Witness:) —— ——. Address: ——

Compiled in applicant's handwriting and read over in my presence before signing:

Description of Applicant

(To be filled out by the employing officer)

Height *5* feet *8* inches. Weight: *145* pounds. Color of hair: *Dark.* Color of eyes: *Blue.* Give description of distinguishing marks or peculiarities: ——.

I consider the above described applicant a suitable person to enter the Company's temporary service. I desire to employ him as *Switchman,* at —— Station, *W. & P.* Division. Effective: *Nov. 7, 1911.*

Name: —— ——, Title: ——.

9:00 A. M.

Approvd: *H C 11/28/11.*

Approved: —— ——.

(Here follows table, side folio 230)

[fol. 230]

How and Where Previously Occupied

Applicant must give here his continuous record in regular order in which it occurred.
Names and present post office address of Two responsible business men not relatives, and their Business Titles must be shown to verify periods during which the applicant may be out of employment, in business for himself or working for relatives.
Names and present post office addresses of employers must be shown for periods during which the applicant may have been engaged in other than railway service.

	From			To			Occupation	Location	Under Whom Employed			What road or Firm	Reason for L... if Disch... State W...
	Month	Day	Year	Month	Day	Year			Name	Title	Location		
1	July	17	1904	Dec.	22	1906	Switch tender	St. Paul	George Panock	GYM	St. Paul	N. D. Co.	Better position
2	Dec.	23	1906	Nov.	30	1909	Switchman	St. Paul	R. H. Rores	"	"	CN & St. P.	Better myself
3	Nov.	30	1909	June	1	1910	Farming	St. Cloud	W. D. Robertson	Farmer	RR4 Box 24		"
4	June	1	1910	Sept.	25	1910	Brk. on work tr.	Sauk Rapids	Elzy & Hoy	Contractors	Rapids	St. Paul Met. Opr.	Finish the job
5	Sept.	25	1910	Nov.	15	1910	Constr. work	Waverly	R. I. P. Co.	"	Waverly	Marshalltown, Ia.	Better myself
6	Nov.	15	1910	Jan.	15	1911	Com Labor	R. Island		Labor	R. Island		Laid off on account
7	Jan.	15	1911	May	1	1911	Not working at Rock Island, Ill.						
8	May	1	1911	Nov.	1	1911	Com Labor	R. Island	A. B. Williams	Br. Layer	Moline, Ill.		
9	Nov.	1	1911	"	6	1911	Not working						
10													
11													
12													
13													
14													
15													
16													
17													
18													
19													
20													

Williams, Grocer, 16th St., Rock Island, Ill.

James McGeary, Chief Engineer, St. Paul Post Office, St. Paul, Minn.
Jerry C. Hatcher, Superintendent, Palace Clothing Co., St. Paul, Minn.

In order that the M. St. P. & S. S. M. Ry. Co. may be fully informed as to my personal character and my qualifications for the position for which I have made application I re... of my former employers, and request and authorize each of the said companies, for whom I have formerly worked, to give the above named Company all information that they may be... sion of, whether shown by personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for and the reason why I was dis... left their service, upon any inquiry that may be made of them or either of them, by said Minneapolis, St. Paul & Sault Ste. Marie Railway Company. After leaving the service of... named Company, I hereby authorize said Company to answer any or all inquires which may be made of them as to my conduct and qualifications while in such service, and the c... leaving same.

Witness: —— ——.

J. M. Borum.....

How and Where Previously Occupied

nt must give here his continuous record in regular order in which it occurred.
nd present post office address of Two responsible business men not relatives, and their Business Titles must be shown to verify periods during which the applicant may have been loyment, in business for himself or working for relatives.
nd present post office addresses of employers must be shown for periods during which the applicant may have been engaged in other than railway service.

From		To			Occupation	Location	Under Whom Employed			What road or Firm	Reason for Leaving. if Discharged State Why
Day	Year	Month	Day	Year			Name	Title	Location		
17	1904	Dec.	22	1906	Switch tender	St. Paul	George Panock	GYM	St. Paul	N. D. Co.	Better position
23	1906	Nov.	30	1909	Switchman	St. Paul	R. H. Rores	"	"	CN & St. P.	Better myself
30	1909	June	1	1910	Farming	St. Cloud	W. D. Robertson	Farmer	RR4 Box 24		"
1	1910	Sept.	25	1910	Brk. on work tr.	Sauk Rapids	Elzy & Hoy	Contractors	Rapids	St. Paul Met. Opr.	Finish the job
25	1910	Nov.	15	1910	Constr. work	Waverly	R. I. P. Co.	"	Waverly	Marshalltown, Ia.	Better myself
15	1910	Jan.	15	1911	Com Labor	R. Island		Labor	R. Island		Laid off on account of sickness
15	1911	May	1	1911	Not working at Rock Island, Ill.						
1	1911	Nov.	1	1911	Com Labor	R. Island	A. B. Williams	Br. Layer	Moline, Ill.		
1	1911	"	6	1911	Not working						

ams, Grocer, 16th St., Rock Island, Ill.

James McGeary, Chief Engineer, St. Paul Post Office, St. Paul, Minn.
Jerry C. Hatcher, Superintendent, Palace Clothing Co., St. Paul, Minn.

hat the M. St. P. & S. S. M. Ry. Co. may be fully informed as to my personal character and my qualifications for the position for which I have made application I refer to each employers and request and authorize each of the said companies, for whom I have formerly worked, to give the above named Company all information that they may be in possession of or shown by personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for and the reason why I was discharged or left the service, upon any inquiry that may be made of them or either of them, by said Minneapolis, St. Paul & Sault Ste. Marie Railway Company. After leaving the service of the above named Company, I hereby authorize said Company to answer any or all inquires which may be made of them as to my conduct and qualifications while in such service, and the cause of my

——— .

J. M. Borum .....

[fol. 231] In order that the M. St. P. & S. S. M. Ry. Co. may be fully informed as to my personal character and my qualifications for the position for which I have made application I refer to each of my former employers, and request and authorize each of the said companies, for whom I have formerly worked, to give the above named Company all information that they may be in possession of, whether shown by personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for and the reason why I was discharged or left their service, upon any inquiry that may be made of them or either of them, by said Minneapolis, St. Paul & Sault Ste. Marie Railway Company. After leaving the service of the above named company, I hereby authorize said Company to answer any or all inquiries which may be made of them as to my conduct and qualifications while in such service, and the cause of my leaving same.

J. M. Borum.

Witness: —— ——.

DEFENDANT'S EXHIBIT 2

Form 1210 2M 9-28 T-GW

No. —

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Applicant's Statement of His Physical Condition

1. Name: (In full, if no middle name so state) *James Monroe Borum.* Proposed occupation: *Switchman.* Present address: *1019, 28 Ave. N. E. Mpls.* Date of birth: *Oct. 20, 1883.*

[fol. 232] 2. When and where have you undergone physical examination on any other railroad? No.

3. Have you had or have you now any of the following? Pneumonia, *No.* Bronchitis, *No.* Asthma, *No.* Pleurisy, *No.* Tuberculosis, *No.* Small pox, *No.* Rheumatism, *No.* Diarrhoea, *No.* Constipation, *No.* Appendicitis, *No.* Piles, *No* Tape or round worm, *No.* Syphilis, *No.* Gonorrhoea, *No.* Stricture, *No.* Heart disease, *No.* Kidney disease, *No.* Jaundice, *No.* Headache, *No.* Fits, *No.* Sunstroke, *No.* Sore eyes, *No.* Ear trouble, *No.* Bladder

trouble, *No.* Rupture, *No.* Varicose veins, *No.* Varicocele, *No.*

4. State fully what other sickness you have had. *Mumps and measles.*

5. When were you last successfully vaccinated? *Winchester, Ill. 1906.*

6. Have you ever or do you now use tobacco? *Yes.*

7. Do you drink intoxicating liquors? *No.* Have you undergone a cure for the liquor habit? *No.* Answer fully. ——.

8. Have you had a sprain? *No.* If so, state of what, and how long disabled. ——.

9. Have you had a broken bone? *No.* If so, of what? ——.

10. Have you a stiff joint? *No.*

11. Have you had a dislocation? *No.*

[fol. 233] 12. Have you had any injury of head, neck, or back? *No.* If so, answer fully. ——.

13. State fully what other injuries you have had. *Right little finger and forefinger.*

14. Have you ever been operated upon? *No.* If so, answer fully. ——.

15. If injured or operated upon give place treated: If at home: Street, ——; Town, ——; State, ——. If at hospital: Name, ——; Town, ——; State, ——. Name of Surgeon: —— ——. Date: ——.

The above answers to the foregoing questions are true and correct to the best of my knowledge.

Sign full name in presence of Examining Surgeon.

James Monroe Borum.

Report of Examination of Vision, Color, Sense, and Hearing

Full signature of applicant: *James Monroe Borum.* Age: *28.*

Applicant for Employment for the position of *Switchman.*

Surgeon's Report of Physical Examination.

Applicant must have all clothing removed for this examination

1. Age: *28* years. Height: *5* feet *9 1/2* inches. Weight: *145* pounds. Complexion: *Ruddy.* Color of eyes: *Blue.*

Color of hair: *Brown.* Nationality: *Am.* Figure: *Erect.* [fol. 234] General appearance: *Strong.* Bright or dull: *Bright.* Tatoo figures and special marks for identification: *None.*

2. Full inspiration: *36* in. Deep expiration: *32 1/2* in. Girth of abdomen: *32 1/2* in.

3. Does auscultation disclose bronchitis? *No.* Asthma? *No.* Or suspicion of tuberculosis? *No.*

4. Is respiration clear and distinct in every part of both lungs? *Yes.*

5. Does auscultation clearly reveal normal heart valves? *Yes.*

6. Is there any evidence of disease of the heart or blood vessels? *No.* Bl. Pr.: S. —, D. —.

7. Character and rate of pulse, sitting? *84.*

8. Abdomen: Is there a hernia (make digital examination)? *No.* Appendix: *O. K.* Liver and gall bladder: *O. K.* Other abdominal viscera: *O. K.*

9. Note any defects of bones and functions of joints of the extremities. Upper: Right, *None;* left, *None.* Lower: Right, *None;* left, *None.*

10. Has he flat feet (let him stand on bare feet)? *No.* Varicose veins? *No.*

11. Can applicant touch floor with fingers without bending knees? *Yes.*

[fol. 235] 12. Note anything abnormal: Head (scalp scars and depressed fracture): *None.* Mouth and teeth: *Carious teeth.*

13. Are both nostrils freely open? *Yes.* Are tonsils enlarged? *No.*

14. Are there any skin lesions which show that applicant has itch? *No.* Or vermin? *No.*

15. Has applicant had small pox, or been recently vaccinated (vaccination compulsory)? *Vaccinated today.*

16. Are there any symptoms of locomotor ataxia? *No.* Goitre? *No.* Or other nervous trouble? *No.*

17. Has applicant varicocele? *No.* Hydrocele? *No.* Hemorrhoids? *No.*

18. Has he gonorrhoea? *No.* Or any manifestations of syphilis? *No.*

19. Urinalysis: Specific gravity, *1006;* reaction, *Acid;* albumin, *No;* sugar, *No.*

20. Is his appearance that of a temperate man? *Yes.*
Summary of defects: *Carious teeth; cannot completely extend right small finger.*

I certify that I have carefully examined the applicant whose signature I have witnessed above; that the foregoing is a correct description of his physical condition, and that he is physically qualified, for the position of *Switchman.*

—— ——, Examining Surgeon.

Dated at *Mpls.* this *7th* day of *Nov., 1911.*

[fol. 236] The foregoing statement of the physical examination of the applicant indicates that he is qualified *Nov. 7, 1911.*

J. H. Rishmiller, Chief Surgeon.

This record of examination must be forwarded at once by the Examining Surgeon to the Chief Surgeon, Minneapolis, Minn.

All questions must be answered in full. When this is not done, report will be returned to Surgeon for completion.

DEFENDANT'S EXHIBIT 3

No. 84. Form (B)

Minneapolis, St. Paul & Sault Ste. Marie Railway Co.

Examination of Brakemen, Flagmen, Baggagemen, and Firemen on Operating Rules Effective May 1st, 1912

Name (in full): *James Monroe Borum.*
Occupation: *Switchman.*
Division or District: *Wisconsin.*
Date of Examination: *April 13, 1912.*
Approved by *T. C. Loftus, Examiner.*
Date approved: *May 30, 1912.*
Approved: *F. W. Curtis,* Superintendent.
Give your name in full. *James Monroe Borum.*
Date of birth: *October 20, 1883.*
Place of birth: *Scott Co. Illinois.*
Where do you reside? *1019 28 Ave. N. E. Mpls.*
[fol. 237] Are you married or single? *Single.*
Whom do you wish notified in case of injury or serious illness. (Give name and address in full)? *Miss Della Borum, 527-17 St. Rock Island, Ill.*

DEFENDANT'S EXHIBIT "4"

Form 3868. 3M. 10-28 J.

No. —

Minneapolis, St. Paul & Sault Ste. Marie Railway Co.

Application for Employment

Applications for employment will be made on this form by such classes of employees entering the service as have been and may be designated hereafter, and a medical examination required covering certain occupations.

A fee of $3.00 will be charged for the medical examination, the applicant's proportion being $1.50 which will be refunded if disqualified.

Upon satisfactory completion of all required papers and examinations, the applicant will be allowed to enter the service on probation, providing there is need of his services, but shall not be considered as an employee until the application is finally approved. Applicants under 21 years of age must furnish a Minor's Release on Standard Form.

1. Full name of applicant (write given and middle name in full): *James Monroe Borum.*
2. Employment desired: *Switchman.*
3. Age: *39.*
4. Date of birth: *Oct. 20, 1883.*
5. Nationality: *American.*

[fol. 238] 6. Where born: *Scott Co., Ill.*

7. Married. *Single.*
8. If married, give name and address of wife (city, street and number): ——, ——, and names and ages of children: ——.
9. Names of parents, if living: *Dead.* P. O. address of parents (city, street and number): ——.
10. If parents are dead, give name and degree of nearest relative. *Sister, Mrs. Walter E. Robertson,* (city, street and number): *R. R. 2, Bx. 23, St. Cloud, Minn.*
11. Names and addresses of any persons dependent on you for support or to whose support you are contributing. —— (city, street and number) ——.

12. Have you ever made application to the M. St. P. & S. S. M. Ry. Co. before? *Yes.*

In what capacity? *Switchman.* At what Place? ——. Date entered service: *November 7, 1911.* Date left service: *March 3, 1917.*

13. Have you now or did you ever have a law suit with any railroad company or any one else? *No.*

14. Have you ever before made application for employment and been subjected to physical examination? *Yes.*

When? *Nov. 1911.* Where? *Minneapolis.* Name of Doctor? *Dr. Rishmiller.*

[fol. 239] Accepted? *Yes.* Rejected? ——. Cause? ——.

15. Do you us- intoxicating liquors? *No.*

16. Have you any physical ailment or defect which might render you unfit for railway service? *No.* (Give particulars.) ——.

17. State fully as to any physical injury or operation performed. *Have none.*

In consideration of employment by the Minneapolis, St. Paul and Sault Ste. Marie Railway Company, in addition to the foregoing statements, I hereby declare that I am not addicted to the use of intoxicating liquors, that I will not use them while on duty and at no time to an excessive degree, that I have been informed of the character of the employment I am about to undertake and of the duties connected therewith, that I have been notified that there are numerous bridges, buildings, tunnels, stand-pipes, stock yard chutes, mail cranes, platforms, coal chutes, overhead wires and viaducts, and other obstructions now located and others may be constructed from time to time which will endanger my life and limb, and I agree, in consideration of my employment, to familiarize myself with the same and use due care for my safety without further notice from the Railroad Company, and I accept notice from said Railroad Company that few, if any, of the aforesaid buildings or obstructions will clear a man riding on top or side of a car or engine, and that I am to use constant care for my safety [fol. 240] in working about same. Under no circumstances will I go between moving cars or engines to open or adjust couplings or for any other purpose, and in the event that it is necessary for me to go into the yards of other com-

panies, I understand and agree that I must exercise the same care as when employed in the yards or on the property of the Minneapolis, St. Paul and Sault Ste. Marie Railway Company.

I also agree to examine and know for myself that the ways, works or machinery connected with or used in my employment are at all times in safe and proper condition, and agree to give immediate notice in writing to some person superior to myself in the service of the Company of any defect in the condition of ways, works or machinery connected with or used in my employment, and if I continue to use such ways, works or machinery with a defect or defects therein, I agree to assume the risk of an accident as a risk incident to my employment, and hereby waive the provisions of any kind and all statutes or laws with respect thereto.

In consideration of my employment by said Company, I further agree that whenever I shall sustain any personal injury while in the service of said Company I will allow its surgeons and any medical examiners it may select to examine my person and body as often as the Company may deem necessary in respect to the alleged injury, and I hereby waive all objections to such surgeons or medical examiners testifying whenever called upon by the Company, and I further agree that my refusal to allow any such [fol. 241] examination to be made or testimony to be given shall be a bar to the institution or prosecution of any action on account of such injuries, and any action pending at the time of such refusal shall at once abate in consequence thereof. And in the event of any suit or action against said Company for injuries received, I hereby agree for myself, assigns, heirs, administrators or executors, in consideration of my said employment, that any physician or surgeon who may have attended or examined me may testify as to all facts in his knowledge, whether derived from the confidential relation of physician and patient or not, and I waive all objections to such physicians or surgeons so testifying.

(Signed) *James Monroe Borum.*

Permanent address (city, street and number): *2830 Polk St. N. E.*

(Witness:) *H. J. Pagel.* Address: *Mpls.*

Compiled in applicant's handwriting and read over in my presence before signing:

Description of Applicant

(To be filled out by the employing officer)

Height: —— feet, —— inches. Weight: —— pounds. Color of hair: ——. Color of eyes: ——. Give description of distinguishing marks or peculiarities: ——.

I consider the above described applicant a suitable per-
[fol. 242] son to enter the Company's temporary service. I desire to employ him as *Switchman,* at *Shoreham* Station, *Wis. & Penn.* Division. Effective *Oct. 28,* 1921.

Name: —— ——, Title: —— ——.

Approved: —— ——.
Approved: —— ——.

(Here follows table, side folio 243)

[fol. 243]

How and Where Previously Occupied

Applicant must give here his continuous record for five years back in regular order in which it occurred.
Names and present post office addresses of Two responsible business men not relatives, and their Business Titles must be shown to verify periods during which the applicant may ha
out of employment, in business for himself or working for relatives.
Names and present post office addresses of employers must be shown for periods during which the applicant may have been engaged in other than railway service.

	From			To			Occupation	Location	Under Whom Employed			What Road or Firm	Reason for Lea If Discharge State Wh
	Month	Day	Year	Month	Day	Year			Name	Title	Location		
1	March	13	1917	June	6	1917	Switchman	Mpls. Jct.	Cavanaugh	GYM	Mpls. Jct.	G. N.	Discharged
2	Aug.	13	1917	Sept.	10	1917	Switchman	Minneapolis	Trumble	GYM	Mpls.	C. & G. W.	Quit
3	Sept.	8	1917	Mar.	21	1918	Clerk	St. Paul	Hauser Bro.	Clothers	St. Paul	Hauser Bro.	Quit
4	March	21	1918	Nov.	11	1918	Labor	Washburn, Wis.	Biears	Dupont	Washburn, Wis.	Dupont Powder Co.	Laid off
5	Nov.	15	1918	Oct.	1	1921	Clerk	St. Paul	Hauser Bro.	Clothers	St. Paul	Hauser Bro.	Resigned
6													
7													
8													
9													
10													
11													
12													
13													
14													
15													
16													
17													
18													
19													
20													

In order that the M. St. P. & S. S. M. Ry. Co. may be fully informed as to my personal character and my qualifications for the position for which I have made application I refer to my former employers, and request and authorize each of the said companies, for whom I have formerly worked, to give the above named Company all information that they may be in possession of, whether shown by personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for and the reason why I was discharged or left their service, upon any inquiry that may be made of them or either of them, by said Minneapolis, St. Paul & Sault Ste. Marie Railway Company. After leaving the service of the above named Company, I hereby authorize said Company to answer any or all inquiries which may be made of them as to my conduct and qualifications while in such service, and the cause of leaving same.

Witness: H. J. Pagel.

J. M.

How and Where Previously Occupied

ant must give here his continuous record for five years back in regular order in which it occurred.
and present post office addresses of Two responsible business men not relatives, and their Business Titles must be shown to verify periods during which the applicant may have been oyment, in business for himself or working for relatives.
and present post office addresses of employers must be shown for periods during which the applicant may have been engaged in other than railway service.

From		To			Occupation	Location	Under Whom Employed			What Road or Firm	Reason for Leaving; If Discharged State Why
th Day	Year	Month	Day	Year			Name	Title	Location		
h 13	1917	June	6	1917	Switchman	Mpls. Jct.	Cavanaugh	GYM	Mpls. Jct.	G. N.	Discharged
13	1917	Sept.	10	1917	Switchman	Minneapolis	Trumble	GYM	Mpls.	C. & G. W.	Quit
8	1917	Mar.	21	1918	Clerk	St. Paul	Hauser Bro.	Clothers	St. Paul	Hauser Bro.	Quit
h 21	1918	Nov.	11	1918	Labor	Washburn, Wis.	Biears	Dupont	Washburn, Wis.	Dupont Powder Co.	Laid off
15	1918	Oct.	1	1921	Clerk	St. Paul	Hauser Bro.	Clothers	St. Paul	Hauser Bro.	Resigned

e that the M. St. P. & S. S. M. Ry. Co. may be fully informed as to my personal character and my qualifications for the position for which I have made application I refer to each of employers, and request and authorize each of the said companies, for whom I have formerly worked, to give the above named Company all information that they may be in possesher shown by personal record or otherwise, as to my personal character and also my qualifications for the position I have herein applied for and the reason why I was discharged or vice, upon any inquiry that may be made of them or either of them, by said Minneapolis, St. Paul & Sault Ste. Marie Railway Company. After leaving the service of the above pany, I hereby authorize said Company to answer any or all inquiries which may be made of them as to my conduct and qualifications while in such service, and the cause of my e.

ess: H. J. Pagel. J. M. Borum.

[fol. 244] DEFENDANT'S EXHIBIT "5"

Form 1210 2M 9-28 T-GW

No. —

Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.

Applicant's Statement of His Physical Condition

1. Name (In full; if no middle name so state:) *James Monroe Borum.* Proposed occupation: *Switchman.* Present address: *2830 Polk St. N. E. Mpls.* Date of Birth: *Oct. 20, 1883.*

2. When and where have you undergone physical examination on any other railroad? *G. N. April, 1917—Chicago & Great Western August, 1917.*

3. Have you had or have you now any of the following? Pneumonia, *No.* Bronchitis, *No.* Asthma, *No.* Pleurisy, *No.* Tuberculosis, *No.* Small pox, *No.* Rheumatism, *No.* Diarrhoea, *No.* Constipation, *No.* Appendicitis, *No.* Piles, *No.* Tape or round worm, *No.* Syphilis, *No.* Gonorrhea, *No.* Stricture, *No.* Heart disease, *No.* Kidney disease, *No.* Jaundice, *No.* Headache, *No.* Fits, *No.* Sunstroke, *No.* Sore eyes, *No.* Ear trouble, *No.* Bladder trouble, *No.* Rupture, *No.* Varicose veins, *No.* Varicocele, *No.*

4. State fully what other sickness you have had. *None.*

5. When were you last successfully vaccinated? *Mpls. Health Dept. April, 1917.*

6. Have you ever or do you now use tobacco? *No.*

[fol. 245] 7. Do you drink intoxicating liquors? *No.* Have you undergone a cure for the liquor habit? *No.* Answer fully. *No, Sir.*

8. Have you had a sprain? *No.* If so, state of what, and how long disabled. ——.

9. Have you had a broken bone? *No.* If so, of what? ——.

10. Have you a stiff joint? *No.*

11. Have you had a dislocation? *No.*

12. Have you had any injury of head? neck? or back? *No.* If so, answer fully. ——.

13. State fully what other injuries you have had. *None.*

14. Have you ever been operated upon? *No.* If so, answer fully. ——.

15. If injured or operated upon give place treated. If at home: Street, ——; Town, ——; State, ——. If at hospital: Name, ——; Town, ——; State, ——. Name of Surgeon: —— ——. Date: ——.

The above answers to the foregoing questions are true and correct to the best of my knowledge.

Sign full name in presence of Examining Surgeon.

James Monroe Borum.

Report of Examination of Vision, Color, Sense, and Hearing

Full signature of applicant: *James Monroe Borum.* Age: *39.*

Applicant for (Employment for) the position of *Switchman.*

[fol. 246] Surgeon's Report of Physical Examination

Applicant Must Have All Clothing Removed for This Examination

1. Age: *39* years. Height: *5* feet *9 1/4* inches. Weight: *182 1/2* pounds. Complexion: *Medium.* Color of eyes: *Blue.* Color of hair: *Gray.* Nationality: *American.* Figure: *Erect.* General appearance: *Healthy.* Bright or dull: *Bright.* Tat-oo figures and special marks for identification: *2 blue cinder marks in skin, outside of right eye.*

2. Full inspiration: *39* in. Deep expiration: *37* in. Girth of abdomen: *39 1/2* in.

3. Does auscultation disclose bronchitis? *No.* Asthma? *No.* Or suspicion of tuberculosis? *No.*

4. Is respiration clear and distinct in every part of both lungs? *Yes.*

5. Does auscultation clearly reveal normal heart valves? *Yes; Bl. Pr. S. 110; D. 76.*

6. Is there any evidence of disease of the heart or blood vessels? *No.* Bl. Pr: S—, D—.

7. Character and rate of pulse, sitting? *Normal.*

8. Abdomen: Is there a hernia (make digital examination); *No.* Appendix: *OK.* Liver and gall bladder: *OK.* Other abdominal viscera: *OK.*

[fol. 247] 9. Note any defects of bones and functions of joints of the extremities. Upper: Right: *Flexor tendon*

of right small finger is contracted—preventing extension—stiff finger. Left: *None.* Lower: Right: *None.* Left: *None.*

10. Has he flat feet (let him stand on bare feet) *No.* Varicose veins? *No.*

11. Can applicant touch floor with fingers without bending knees? *Barely.*

12. Note anything abnormal. Head (scalp scars and depressed fracture): *No.* Mouth and teeth: *Lower Jaw: 10 teeth, 2 of which are gold crowned and 1 filled; 2 snags; upper jaw; 11 teeth, nearly all filled or gold crowned; 2 snags.*

13. Are both nostrils freely open? *Yes.* Are tonsils enlarged? *Enlarged.*

14. Are there any skin lesions which show that applicant has itch? *No.* Or vermin? *No.*

15. Has applicant had small pox, or been recently vaccinated (vaccination compulsory)? *Vacc. scar, left arm.*

16. Are there any symptoms of locomotor ataxia? *No.* Goitre? *No.* Or other nervous trouble? *No.*

[fol. 248] 17. Has applicant varicocele? *No.* Hydrocele? *No.* Hemorrhoids? *No.*

18. Has he gonorrhoea? *No.* Or any manifestations of syphilis? *No.*

19. Urinalysis: Specific gravity, *1008;* reaction, *Acid;* albumin, *No;* sugar, *No.*

20. Is his appearance that of a temperate man? *Yes.*

Summary of defects: *Enlarged tonsils; Flexor tendon of R. small finger is contracted, preventing extension—stiff finger, Dentist Griffith extracted three snags under local on November 3, 1921.*

I certify that I have carefully examined the applicant whose signature I have witnessed above; that the foregoing is a correct description of his physical condition, and that he is physically qualified, for the position of *Switchman.*

—— ——, Examining Surgeon.

Dated at *Minneapolis* this 2nd day of *November,* 1921

The foregoing statement of the physical examination of the applicant indicates that he is qualified *November 2,* 1921.

J. H. Rishmiller, Chief Surgeon.

This record of examination must be forwarded at once by the Examining Surgeon to the Chief Surgeon, Minneapolis, Minn.

All questions must be answered in full. When this is [fol. 249] not done, report will be returned to Surgeon for completion.

DEFENDANT'S EXHIBIT "6"

No. 6789

Form (A)

Minneapolis, St. Paul & Sault Ste. Marie Railway Co.

Examination of Train Dispatchers, Conductors, and Engineers on Operating Rules Effective May 1st, 1912

Name in full: *James M. Borum.*
Occupation: *Switchman.*
Division or District: *T. C. T.*
Date of Examination: *March 22nd, 1926.*
Approved by *H. D. Keene,* Examiner.
Date Approved: *March 25th, 1926.*
Approved: *F. W. Curtis,* Superintendent.

F 500 9-16-25.

Give your name in full. *James M. Borum.*
Date of birth: *Oct. 20, 1883.*
Place of birth: *Scott Co., Illinois.*
Where do you reside? *2830 Polk St., Mpls.*
Are you married or single? *Married.*
Whom do you wish notified in case of inqury or serious illness (give name and address in full)? *Mrs. J. M. Borum, 2830 Polk St., N. E. Mpls.*

Endorsed: Filed September 18, 1931. Grace Kaercher Davis, Clerk, Minn. Supreme Court.

Hennepin County, Dibell, J.

No. 38. 28283

JAMES M. BORUM, Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RY. CO., Appellant

Wilson, C. J.; Loring, J., dissenting. Stone, J., concurring.

Syllabus

1. In a statutory arbitration under G. S. 1923 (2 Mason 1927) § 9513, the award may be reviewed if it is "contrary to law and evidence". This permits the district court to vacate an award if there is no evidence to sustain it. It does not give the right to vacate on discretionary grounds.

2. It was a rule of the defendant that applicants for positions in yard service not rejected in 30 days would be considered accepted. The plaintiff's application was made in 1921, it was not rejected, and he entered the company's service and continued at work until his injury in 1928. The finding of the arbitrators that he acquired the status of an employe under the Federal Employers' Liability Act is sustained by the evidence.

3. The plaintiff misrepresented his age when he made his application in 1921. There was no causal connection between his false representation and the injury which he sustained. The negligence of the defendant was the proximate cause of the injury. Misrepresentations of age were general in the railway service, and it was so understood by the defendant. The plaintiff had worked for it at a prior time for a period of six years, commencing in 1911, and was known to defendant's employing officers. When injured he was within the permitted working age. He could have worked nine years longer before reaching the age of re-

tirement. His only wrong or fraud was in misrepresenting his age to get a job. He was fit to do the work. The findings and award of the arbitrators, approved by the district court, that he was entitled to the protection of the liability act and that public policy did not require a denial of it because of his misrepresentation, are sustained.

Judgment affirmed.

OPINION

DIBELL, J.:

The plaintiff sustained an injury while working for the defendant in interstate commerce. He brought an action for damages. Issue was joined. The parties then entered into an agreement for arbitration of all the issues comprehended in the pleadings. The arbitrators awarded the plaintiff $12,500. It was a statutory arbitration. The court confirmed the award. Judgment was entered for the plaintiff, and the defendant appeals.

On December 11, 1928, the plaintiff, Borum, sustained the loss of both legs below the knees while employed as a switchman in the yards of the defendant at Minneapolis. His work was in interstate commerce. He brought suit under the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. A., § 51, et seq. The arbitrators found the defendant's negligence the proximate cause of the injury. No complaint is made of the finding.

It was a part of the agreement of arbitration that the plaintiff should be paid $12,500 and that such sum should be retained whatever the finding of the arbitrators on the question of liability should be; and that if the decision of the arbitrators was in favor of the plaintiff on the merits they should make an award of $12,500. This was additional to the $12,500 mentioned before. Three arbitrators were chosen by the parties from the bar of Minneapolis and St. Paul. They made their findings, and, on a further hearing, supplemental findings, and awarded the plaintiff $12,500.

There are three questions involved:

(1) Whether, under the agreement for arbitration quoted hereinafter, the award was final on all questions including those of law; in short, whether the award was reviewable in the district court and in this court.

(2) Whether a rule of the company that an application for employment is accepted if not rejected within 30 days after it is made applies and is effective in determining the status of the employe.

(3) Whether the misrepresentation of his age by the plaintiff to obtain employment prevented his recovery of damages when there was no causal connection between his misrepresentation of his age or his physical condition and the injury he received.

The plaintiff sustained his injury on December 11, 1928. He was employed by the defendant in October, 1921, and continued in his employment until his injury. He was first employed by the defendant in 1911 and quit in 1917. He worked for other roads, at least a part of the time, until he came back to the Soo in 1921. He was then 49 years of age. In his application he stated his age to be 38 years. In his application in 1911 he gave his age as 28. He submitted to the usual medical examination in 1921 and was found in good health and acceptable physical condition. He performed his work satisfactorily until his injury. His application was not rejected.

The company had a rule as follows:

"No person inexperienced in railroad work over 35 years, and no experienced person over 45 years, shall hereafter be taken into the service."

Another rule provided:

"Applications for employment in yard service not rejected in thirty days will be considered accepted."

The company had this rule relative to retirement:

"All officers and employees who have attained the age of 65 years shall be retired; provided, however, that the pension board with the approval of the president, shall have power to retain in the service any officer or employee who has reached the age of 65 years, if in their opinion it is in the interest of the company so to do, but such retention in the service shall not extend beyond the period when such officer or employee shall have attained the age of 70 years."

For convenience in considering the three questions and ease of review we quote the arbitration agreement and the findings substantially in full, with some reference to the testimony.

The agreement of submission was as follows:

"Know all men that James M. Borum of Minneapolis, Minnesota, herein designated as plaintiff, and Minneapolis, St. Paul & Sault Ste. Marie Railway Company, a railway corporation, having its principal office and place of business at Minneapolis, Minnesota, herein designated as defendant, have agreed to, and do hereby, submit all demands, claims, issues and matters in dispute between them, both as to law and fact set forth and comprehended within the pleadings hereto annexed, to the determination of Mathew M. Joyce of Minneapolis, Minnesota; Harry S. Stearns of St. Paul, Minnesota, and John P. Devaney of Minneapolis, Minnesota; the award of whom, or a majority of whom, being made and reported within forty days from this date to the District Court of the county of Hennepin, the judgment thereon shall be final.

"As part hereof, it is further agreed and stipulated:

"1. That James M. Borum, party hereto and herein designated as plaintiff, suffered injury resulting in the loss of both legs below the knee while acting as a switchman in said railway company's yards at Minneapolis, Minnesota, on the 11th day of December, 1928, which injury is the basis of the action hereinafter referred to and covered by the pleadings hereto annexed.

"2. That the nature of defendant's business and of the work which plaintiff was doing at the time of said injury was such as to bring both parties within the Federal Employers' Liability Act, if plaintiff be held an employe of defendant within the meaning of said act.

"3. That the circumstances of the infliction of said injury were such as to make a jury question as to the negligence of defendant, its agents or servants, proximately causing, or contributing to, said injury.

"4. That suit for said injury was duly brought under the Federal Employers' Liability Act as shown by said pleadings; that the question of whether plaintiff was, at the time

of said injury, an employe within the meaning of said act and as such entitled to all the benefits and privileges thereof, is in controversy herein; that if he was not at said time an employe within the meaning of said act and entitled to all the benefits and privileges thereof, he has no cause of action against the defendant.

"5. That, irrespective of the question of its legal liability for such injury, defendant has paid to plaintiff the sum of $12,500 on account of said injury; which said sum of $12,500 plaintiff may retain whatever may be the decision herein on the merits and legal questions involved.

"6. That if the decision herein shall be in favor of plaintiff and he shall be held an employe of defendant within the meaning of and entitled to all the benefits and privileges of the Federal Employers' Liability Act at the time of receiving such injury, the amount of the award herein shall be an additional $12,500 without deduction of any part of the $12,500 heretofore paid.

"7. That defendant will pay the costs of this arbitration proceeding as such costs may be fixed by the arbitrators."

The award of the arbitrators was as follows:

"We, the undersigned, Matthew M. Joyce of Minneapolis, Minnesota, Harry S. Stearns of St. Paul, Minnesota, and John P. Davaney of Minneapolis, Minnesota, the arbitrators agreed to in that certain agreement of submission to arbitration herein under Chapter 81, General Statutes, Minnesota, 1923, and dated the 17th day of September, 1929, do certify that the above entitled matter was originally heard on October 3rd and 4th, 1929, and then adjourned until the 14th day of October, 1929, which date was thereafter found inconvenient for the interested parties, and the matter was thereupon by informal agreement continued until the 17th day of October, 1929, at which time proceedings were resumed, arguments had and the cause submitted; and we do make and submit the following findings of fact and conclusions of law to the District Court of Hennepin county, Minnesota, after consideration of the pleading and the evidence submitted on behalf of plaintiff and defendant.

"Findings of Fact

"We find:

"1. That the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the defendant herein, is a railway corporation engaged in interstate commerce, having its principal office and place of business at Minneapolis, Minnesota.

"2. That the plaintiff, James M. Borum, suffered injury resulting in the loss of both legs below the knee while acting as a switchman in the yards of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company on the 11th day of December, 1928.

"3. That the circumstances of the infliction of said injury were such as to make a jury question as to the negligence of the defendant, its agents or servants, proximately causing or contributing to said injury. On this issue of negligence we find for the plaintiff.

"4. That suit for said injury was duly brought under the Federal Employers' Liability Act, as shown by the pleadings on file herein, and that the status of the said plaintiff as to his being an employee within the meaning of the act is in controversy herein; that if not an employee of the defendant within the meaning of said act and entitled to its benefits and privileges, he has no cause of action against the defendant.

"5. That the defendant has paid to the plaintiff, irrespective of the question of its legal liability in the premises, the sum of Twelve thousand five hundred dollars ($12,500) on account of said injury, and that the plaintiff may retain said sum irrespective of the decision herein on the merits and legal questions involved.

"6. That plaintiff, James M. Borum, was employed by the defendant, the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, in the year 1921, and was thereafter at all times up to and including December 11, 1928, an employee of said defendant within the meaning of the Federal Employers' Liability Act.

"7. That the true name of the plaintiff was, and is at all times here under consideration, James M. Borum.

"8. That in October, 1921, plaintiff was forty-nine years of age. That in said month and year he sought employment of the defendant and in his written application for employment he gave his age as thirty-eight years, knowing such statement to be untrue.

"9. That the evidence relied upon by the plaintiff as to the knowledge possessed by the defendant of plaintiff's age at the time plaintiff sought employment was so unsatisfactory as bearing upon the question of estoppel, that the arbitrators have been unable to make any finding thereon.

"10. That the plaintiff submitted to the usual medical examination prescribed by the defendant and was found to be in good health and acceptable physical condition.

"11. That neither his age nor the physical condition of the plaintiff contributed to his injury.

"12. That the work performed by the plaintiff for the defendant was satisfactory.

"13. That there was in effect throughout the term of the plaintiff's employment with the defendant a contractual agreement and schedule between the defendant company and various organizations of defendant's employees, section 22 of which reads as follows:

" 'Applications for employment in yard service not rejected in thirty days will be considered accepted,'

to the benefits of which plaintiff was at all times during his employment entitled.

"14. That the plaintiff was not rejected within the thirty day period mentioned following his entry into service, and that thirty days after entering defendant's service the status of the plaintiff became fixed as an employee and he was immune from discharge on anything in connection with the application.

"15. That at the time plaintiff was employed and throughout the period of his employment with the defendant, defendant company had a rule known as No. 16 which provides among other things that:

"'No person inexperienced in railroad work over 35 years, and no experienced person over 45 years, shall hereafter be taken into the service.'

"16. That at the time plaintiff was employed and throughout the period of his employment with the defendant, defendant company had a rule in connection with its pension system known as No. 4 (A), which provides that:

"'All officers and employees who have attained the age of 65 years shall be retired; provided, however, that the pension board with the approval of the president, shall have power to retain in the service any officer or employee who has reached the age of 65 years, if in their opinion it is in the interest of the company so to do, but such retention in the service shall not extend beyond the period when such officer or employee shall have attained the age of 70 years.'

"Conclusions of Law

"The arbitrators are of the opinion, in view of the foregoing determinations of fact, and therefore conclude as a matter of law, that the plaintiff, James M. Borum, was, thirty days after his entry into service of the defendant company in 1921 and at all times thereafter up to and including the 11th day of December, 1928, an employee of the defendant company within the meaning of the Federal Employers' Liability Act. That both parties were at the time and place of the accident, on said date sustained by the plaintiff, engaged in interstate commerce, and that by virtue of the injuries sustained by the plaintiff while in such employ of the defendant, he is entitled to recover from and of the defendant the sum of twelve thousand five hundred dollars ($12,500) in addition to the sum of twelve thousand five hundred dollars ($12,500) heretofore voluntarily paid by the defendant company to the plaintiff. That the defendant pay the accrued costs and expenses of this arbitration. And such constitutes the finding and award of the arbitrators herein."

Afterwards there was a motion granted to re-commit to the arbitrators for further findings the following matters:

"1. Whether the plaintiff understood, at the time of making the written application for employment referred to in

finding number 8, that defendant had a rule or practice against accepting men over 45 years of age as employees in its train service operations.

"2. Whether plaintiff, at the time of making such application for employment, knew he was ineligible as an applicant for employment in switching service under the rules or practice of defendant and whether he made the untrue statement of his age for the purpose of securing such employment in disregard of such rule or practice.

"3. Whether plaintiff made, at the time of making such application for employment, a knowingly false statement of his age to defendant's chief examining surgeon and whether the same was relied on by the surgeon in issuing for plaintiff a certificate of physical fitness required by defendant of employees entering its train service.

"4. Whether defendant gave plaintiff employment as a switchman upon the basis of plaintiff's said application and medical examination and whether said application and medical examination were a regular and essential part of securing employment with defendant under its rules and practices.

"5. Whether defendant had the purpose in adhering to the rule referred to in finding number 15, of promoting safety and efficiency in its railway operations."

In compliance with the order granting the motion, the arbitrators found:

"This matter having been referred to the undersigned arbitrators * * * for further findings as specified and set forth in the said order; and the arbitrators having conferred and given heed to the direction of the court, and considering the record, do make and find as follows:

"1. With reference to the matters set forth in paragraph No. 1 on the second page of the court's order, the arbitrators find that the plaintiff, at the time of making the written application referred to for employment, understood that the defendant had a rule or pracice against accepting men over forty-five years of age as employees in its train service operation.

"2. With reference to the matters set forth in paragraph No. 2 of the court's order, the arbitrators find that the plaintiff did not know that he was ineligible as an applicant for employment in switching service under the rules or practice of the defendant; and we further find from the evidence that it was a general practice for men over forty-five years of age to state their age as being under forty-five when seeking employment of the defendant, and that the defendant was aware of such practice and that men over forty-five years had been employed by defendant in temporary service; and we further find that the plaintiff made the untrue statement of his age for the purpose of securing employment in disregard of the rule or practice heretofore designated as rule No. 16.

"3. With reference to the matters set forth in paragraph No. 3 of the court's order, the arbitrators find that at the time of the plaintiff's making his application for employment to the defendant he made a knowingly false statement of his age to the defendant's chief examining surgeon, and that the same was relied upon by such surgeon as one of the factors considered by him in determining his conclusion with reference to issuing a certificate of physical fitness required by the defendant of employees entering its train service.

"4. With reference to the matters set forth in paragraph No. 4 of the court's order, the arbitrators find that the defendant gave plaintiff employment as a switchman on the basis of plaintiff's application and medical examination, and further find that such application and medical examination were a regular and essential part of securing employment of the defendant under its rules and practices.

"5. With reference to the matters set forth in paragraph No. 5 of the court's order, the arbitrators find that the purpose of the defendant in promulgating its rule referred to in finding No. 15 was to promote safety and efficiency in its railway operation."

The arbitrators made the following memorandum explanatory of supplemental finding No. 2:

"With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that the record

shows that the following testimony was given by the plaintiff: 'They were liable to hire me over the age limit, which they have done,' and that the record further showed the defendant's witness Pagel had testified that the practice of men giving erroneous ages in order to obtain employment was one which was being 'done every day' and was a general practice 'in this northwest territory' with reference not only to the defendant but to other railroads as well—we could not find that the plaintiff knew he was 'ineligible as an applicant for employment.' We assume anybody could apply for employment and would be eligible to seek the same. This eligibility of the applicant could mature into a regular employment even though he were over forty-five years old if the defendant elected to waive or modify its rule. Having made the rule, the defendant could, of course, waive, change or abrogate it. While being eligible as an applicant, ne*ther*theless under the rule enforced, he would be ineligible as an employee. We regard a substantial difference existing between one's eligibility to apply for employment and one's eligibility as an employee under a rule such as here existing where the same is enforced."

1. The plaintiff urges that the award is final since the agreement of submission was of all questions of law and fact and the award could not be vacated by the court upon any ground. We give this claim short attention. The agreement for arbitration was under G. S. 1923 (Mason, 1927) § 9513, et seq. It is so recited in the agreement though the agreement does not follow strictly the form provided by § 9514. Pleadings had been framed before and this accounts for it. Counsel for the plaintiff stated to the court that the arbitration was under § 9513, et seq.

The general grounds for vacating an award, as provided by § 9517 (1-5), refer to fraud or misconduct; or that the arbitrators exceeded their powers; or that the award was so indefinite and imperfect as not to be effective. No complaint of the award on these grounds is made. By § 9513 (5) it is provided that an award may be vacated upon the ground that it is "contrary to law and evidence." Similar language is used in § 9325 (7), relative to motions for a new trial, where one ground is that the decision "is not justified by the evidence or is contrary to law." In construing this phrase, "contrary to law," it is held that a verdict is con-

trary to law if wholly without support in the evidence. It is not contrary to law if only of such character that the court might grant a new trial in its discretion on the ground of insufficiency of evidence. And the phrase has been held applicable to a disobedience of instructions. Buck v. Buck, 122 Minn. 463, 142 N. W. 729; First Nt. Bank of Shakopee v. Strait, 71 Minn. 69, 73 N. W. 645; Valerius v. Richards, 57 Minn. 443, 59 N. W. 534; Alden v. City of Minneapolis, 24 Minn. 254. This was the practical construction in Solliday v. St. Paul, Etc., 178 Minn. 215, 226 N. W. 572.

In the Shakopee case, Mr. Justice Mitchell stated the test to be whether, "conceding all that the evidence tends to prove, the verdict is not supported by the principles of law applicable to the facts." And in the Alden case Mr. Justice Cornell, in considering the seventh ground for a new trial, said that "in considering the question whether it is contrary to law we must assume that state of facts most favorable to the verdict which, under the charge, the jury was at liberty to find." The review in an arbitration proceeding is much the same. Arbitrations are favored. All intendments support the award. The effort is to sustain it. If there is no evidence in its support it will not stand. It is clear that the parties had in view Rock v. Minneapolis &c. R. Co. 279 U. S. 410, 49 S. Ct. R. 363. They felt that the crucial question was whether the plaintiff was an employe who could avail himself of the Federal Employers' Liability Act under the construction there given. All of the parties knew what the purpose of the agreement was, and the language of Chief Justice Gilfillan, in Goddard v. King, 40 Minn. 164, a common law arbitration, to the effect that where the agreement "made the arbitrators judges between them of the law and the fact, they are bound by the decision, if fairly and honestly made, even though the arbitrators have erred in their conclusions of fact, or in the law which they have applied to them," is without application. When they used the term "law and fact" they did not intend that the subject matter of the controversy submitted could be fairly decided contrary to the applicable law and be final and without review. The statute under which they proceeded provides for the filing of the award with the clerk of court, § 9515; its acceptance or rejection or resubmission, § 9516; the grounds of its vacation, § 9517; its modification, § 9518; and the rendition of judgment and possible appeal,

§ 9519. It was not intended by either party that an award in disregard of the evidence and the law would be final, though it did intend that a finding based on evidence should not be subject to review. The plaintiff's claim of absolute finality is without merit.

2. The plaintiff claims that the rule to the effect that applications for employment in yard service not rejected in 30 days will be considered accepted is controlling; that the plaintiff not having been rejected acquired the status of an employe; and that having continued in his work for seven years and until his injury he was then an employe entitled to the protection of the Federal Employers' Liability Act. In short, they found that he was an employe within the act. The evidence of two witnesses for the defendant, who were engaged many years in connection with the hiring of employes for the defendant, put this interpretation upon the rule. There was no testimony opposed. One of the arbitrators put to a witness for the defendant, who had been its superintendent of employment for many years, this question:

Q. "This record shows that Mr. Borum went back to work in 1921, the second time, and that he was hurt in December, 1928; he was there approximately some seven years. Assuming that a few days before this accident, you had discovered that he was eleven years older than he had told you, and, assuming also that his work was satisfactory throughout that period, as indicated by the testimony of Mr. Danforth, what would you have done on the obtaining of that information?

A. "I don't think that anything could have been done at that time. We have got to get at that in accordance with our agreement with the organizations—why, you have got to discover anything of that kind within a certain limit, and that does not cover years; it covers months.

* * * * * * *

Q. "Assuming that you had employed a man outside of the organization, who was not bound by the contract with the organization, and that same information would come to you, what wuld you have done under those circumstances?

A. "Oh, I don't know; that is a question."

By counsel for defendant:

Q. "Well, as I understand it, if he was to be rejected, he would have to be rejected within thirty days from the time of his application?

A. "Yes, sir.

Q. "And if you didn't find it out within the thirty days, then he could not be discharged, unless charges were preferred against him, and a hearing had, and good cause shown for his discharge. Do you know whether or not that would be considered sufficient cause, he having falsified his age?

A. "Well, now, I could not pass on that."

The chief clerk of the department, in service for the defendant ten years, testified:

Q. "You know, from your employment in employing men, that if you had made an investigation of his age within thirty days, and found out that his age was more than forty-five, you would then have the right to reject his application, would you not?

A. "Within thirty days, yes.

Q. "You would have the right to put the man out of the employment of the company?

A. "Yes, sir.

Q. "That would be because, if you found he made a misstatement as to his age or any other matter that was not true, that you would have the right to discharge him?

A. "Yes.

Q. "At the end of thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. "He would be immune from discharge on anything in connection with the application.

Q. "On anything in connection with his application?

A. "Yes, sir.

Q. "As I understand it, at the end of thirty days, his status as an employee of the railroad company would become fixed, and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. "Yes, sir.

Q. "But before that thirty days, he could lose his employment because of statements made in the application?

A. "Yes, sir.

Q. "At the end of the thirty days, he could not lose his status as an employee of the Soo Line Railroad Company, except for a violation of the rules, or failure to perform his work, and on charges preferred and a hearing had, that is correct isn't it?

A. "Yes, that is right.

Q. "If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. "I presume so.

Q. "And you made no effort to do that?

A. "No, sir."

The witness further said in response to hiring a man over the age limit:

A. "Well, if a man comes in and wanted a job, and I asked him how old he was, and he said, 'I am fifty years old,' if he could pass the doctor's examination, I would put him to work temporarily, but I would put him out inside of thirty days.

Q. "What do you do in a case where a man, for instance, discloses his true age, and he is over age, and you employ him for these thirty days, how do you handle his application in that case?

A. "I put it to one side, and within thirty days—I take probably the twenty-ninth day—it has to be within thirty days—I would take him out of the service."

It may be queried whether, under the Rock case, the provision of the rule is important. The language of that case refers to an employe being rightly in the employ of the carrier. However we accept the finding of the arbitrators based upon the testimony of the defendant's witnesses that the employe became an accredited employe at the end of thirty days. It was not customary to investigate ages. The officer took a look and used his judgment. It was customary to investigate the record of the applicant for several years back in respect of matters disclosed by the examination. This was done in respect of the plaintiff. No investigation of his age was made until after action brought more than seven years after his second employment. Times were

brisk and the defendant needed men. The plaintiff had worked for it for six years some time before. He was a satisfactory worker. It was glad to have him back. It just about knew that his age was suspicious. It could have found it readily. It investigated him in other respects for five years back. The question of his age did not trouble. Without more we pass to the decisive question in the case.

3. The defendant relies chiefly on Minneapolis, St. P. & S. Ste. M. R. Co. v. Rock, 279 U. S. 410, 49 S. Ct. R. 363, reversing 247 Ill. App. 600, a case much different in its facts, in support of his claim that the plaintiff, although engaged in interstate commerce and though he sustained an injury as the result of the defendant's negligence, cannot recover because of his false representation of his age to get employment; and this although his age and physical condition had nothing to do with the injury.

In the case cited, which states the controlling law for us, the plaintiff, Joe Rock, applied for a position with the defendant as switchman. He submitted to a physical examination. He had been treated for ulcers of the stomach; his appendix had been removed; and he had a rupture. Because of his physical condition he was rejected. Later he applied for a position under the name of John Rock. He procured one Lenhart to represent himself to be John Rock. Lenhart, under the name of John Rock, took the physical examination and passed. Joe Rock, under the name of John Rock, took employment from the carrier and was injured while doing the work of an employe in interstate commerce. He was not the man for whose services the defendant contracted. Here the plaintiff was. The defendant knew him. It had used him for six years before. And altogether it used him for 13 years without special inquiry.

Rock sustained an injury to which his physical condition did not contribute and with which his fraudulent procurement of Lenhart to impersonate him under the name of John Rock had nothing to do. Referring to him, the court said:

"Respondent was an impostor. His true name is Joe Rock. He obtained employment and remained at work by means of deception and fraud. October 1, 1923, he applied for employment as a switchman in petitioner's yard

at Kolze. In accordance with a rule and the practice of petitioner, respondent was sent to the company's physician for physical examination. It was found that he had been treated surgically for ulcer of the stomach and removal of the appendix and that at the time of the examination he had a rupture. His application was rejected because of his condition. A few days later, respondent under the name of John Rock, representing that he had not theretofore applied, again made application for such employment. Petitioner's superintendent was deceived as to respondent's identity and accepted him, subject to examination to ascertain whether he was physically fit for such work, and sent him to the physician to be examined. Then respondent procured one Lenhart to impersonate him and in his place to submit to the required examination. The physician found Lenhart's condition satisfactory; and, believing that he was the applicant, reported favorably on the application. As a result of the deception petitioner gave respondent employment and it did not learn of the fraud until after December 24, 1924, the date on which respondent was injured.

"We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal Employers' Liability Act."

The court held that he could not recover and put its decision upon the ground that he was not of right an employe within the Employers' Liability Act; that public policy required the support of the defendant in its reasonable regulations having to do with the protection of the employe and his co-employes, and the general public; and that he could not recover though there was no casual connection between his fraud or his physical condition and the injury caused by the negligence of the defendant. The court said:

"The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the act is calculated to stimulate them to proper performance of that duty. Petitioner had a right to require applicants for work on its railroad to pass appropriate physical examinations. Re-

spondent's physical condition was an adequate cause for the rejection of his application. The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the act. * * *

"Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy."

The public policy raised by the law has some reason for its origin in the liability act which gives the employe rights and privileges which he did not have at common law. The rule of the company was against the employment of inexperienced workers over 35 years of age and experienced persons over 45 years. It had the purpose in making and enforcing this rule of promoting safety and efficiency in its railway operations. This is found by the arbitrators. It appears from the testimony of the vice-president that the defendant thought an inexperienced man of 35 better than an experienced one of 45. The inexperienced man of 35 had a possibility of 30 years of work before retirement and pension and the 45-year-old man a possibility of 20. The period might be extended five years. On the average there is better service per year from a man who enters service at 35 than at 45, and if he lives until 65 the one entering the service at 35 presumably has better earned his pension. In

a long period of years the 35-year-old man is the more profitable. The only reason the 45-year-old man is employed at all is that the carrier can not get enough 35-year-old or younger men.

The public policy effective here did not require the defendant to have or enforce such a rule. It may have had none at all. Then it would be liable for negligence. It might have waived it. Then it would be liable. The public policy upon which the defendant relies was a policy declared and enforced to sustain the rule; not to require its making. No public policy was raised by the law in aid of the public or employes to prevent a man from 45 to 65 working as a switchman if he entered employment at the prescribed age. Borum was fit to work in the yards when injured and for nine years more. His wrong was in misrepresenting his age to get a job. Rock never was fit to be in the yards. It is not supposed that a co-employe or one of the public injured could complain of the defendant because it did not make or observe such a rule; and in such a case there could not be a recovery in the absence of negligence which was a proximate cause. There was no policy offended by using a man of the plaintiff's age. In 1921 he had 16 working years before retirement; and in 1928, when injured, 9 years. The pension board might extend his work period five years.

The arbitrators found that it was generally known that railway employes, in order to avoid the application of an unfavorable age rule, gave a wrong age. The chief clerk testified that he took his own judgment in determining age; that he did not investigate; that it was the general practice to understate ages "in this northwestern territory." Again he said: "I would not say that I know it is the practice; I believe it is an understanding". And again: "I think it is done every day." The arbitrators were of the opinion that in view of the testimony of the plaintiff that the defendant was likely to hire him though over the age limit and the common practice of understanding age, the plaintiff did not know that he was ineligible to apply, though if the rule were enforced he would not be eligibile as an employe; and that at the end of the thirty-day period he was an accepted employe. The defendant did not care enough about his age to investigate. Information was readily available. But it examined his record in other respects for five years back. We do not discuss the cases. The Rock case is controll- author-

ity; and applying the rule of that case we have only to determine whether plaintiff's misrepresentation of age to get employment, there being no casual connection between the misrepresentation and the injury, prevents a recovery under the findings and award approved by the district court. Prior to that case the doctrine found support in Stafford v. Baltimore & Ohio &c., 262 F. 807, and Norfolk &c. v. Bondmont's Adm. 107 Va. 515, 59 S. E. 1091. It probably is conceded that except where public policy is successfully invoked the holdings generally have been that in the absence of cause and effect a recovery is not preve ed by the misrepresentation. See Hart v. New York Ce rai &c. 205 N. Y. 317, 98 N. E. 493; Matlock v. Railroad, 3 Mo. 495, 95 S. W. 849; Lupher v. Atchison &c. R. Co. 8 Kan. 585, 106 Pa. 284; Louisville &c. v. Lewis, 218 Ky. 1-7, 291 S. W. 401. It was so held under the federal act in Payne v. Daugherty, 283 F. 353, and St. Louis &c. v. Brai ley, 168 Ala. 579, 53 So. 305, public policy not being featured but importance being attached to the absence of a ca al relation between the representation and the injury. e note that in Ward v. Elgin, &c. R. Co. 259 Ill. App. 672 abstract of decision) the same appellate district that deci d the Rock case, under circumstances less aggravating than in that, held against a recovery. And in Qualis v. Atchison &c. — Cal. App. —, 296 P. 465, the misrepresentation was held so insignificant as to be of no consequence.

Giving due consideration to the laim that public policy as a matter of law prevents a recover and due consideration to the award and intendments which attach to the findings of the arbitrators and the inferences which they draw, we hold that the plaintiff's falsification of his age to get a job, under the circumstances narrated, it having no casual connection with his injury, did not prevent his recovery under the liability act. The Rock case was not intended to determine against liability upon such facts as are before us.

Judgment affirmed.

Dibell, J.

STONE, J.:

I concur in the result.

Wilson, C. J., dissenting:

I dissent for the reason that in my opinion the doctrine of Rock v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. 279 U. S. 768, prevents plaintiff's recovery.

Wilson C. J.

Loring, J., dissenting:

I agree with the Chief Justice.

Loring, J. S. B. W.

State of Minnesota:

In Supreme Court, 1930

28283

James M. Borum, Plaintiff-Respondent,

vs.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Defendant-Appellant

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

Petition for Stay

To the Honorable the Supreme Court of the State of Minnesota:

Defendant and appellant in the above entitled action most respectfully petitions and represents:

That it feels itself aggrieved by the decision and order for judgment of this Court herein affirming the order and judgment of the Court below, and ordering the entry of final judgment in this Court.

Defendant and appellant does therefore desire in good faith to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Court, when entered, and will use all due diligence to prepare its petition and the record herein and will submit the same to the Supreme Court of the United States as soon as is reasonably possible.

Wherefore defendant and appellant prays the order of this Court staying all proceedings herein during the pendency of its application and petition to the said Supreme Court of the United States for writ of certiorari, and proceedings had thereon.

Dated September 21, 1931.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, by Henry S. Mitchell, John E. Palmer, James L. Hetland.

SUPREME COURT

Filed Sept. 21, 1931.

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT, 1930

28283

JAMES M. BORUM, Plaintiff-Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant-Appellant

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

ORDER STAYING PROCEEDINGS

Upon application of defendant and appellant in the above entitled action:

It is ordered that upon and after the entry of final judgment herein as directed by this Court in its decision and order made and filed on the 18th day of September, 1931; all proceedings herein and in the District Court of Hennepin County, Minnesota, including the issuance of any writ of execution out of either Court, be, and hereby are, in all things stayed pending defendant's petition and application

to the Supreme Court of the United States for a writ of certiorari, and proceedings had thereon.

Dated September 21, 1931.

S. B. Wilson, Chief Justice of the Supreme Court of the State of Minnesota.

SUPREME COURT

Filed Sept. 21, 1931.

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT, 1930

28283

JAMES M. BORUM, Plaintiff-Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant-Appellant

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

It is hereby stipulated by and between the parties to the above entitled action through their respective attorneys, that there be no remittitur to the Court below; that the amount of the final judgment which plaintiff-respondent is entitled to have entered in this Court in his favor and against defendant-appellant is Fourteen Thousand Fifty-nine and 65/100 Dollars ($14,059.65) and Clerk's fees.

It is further agreed that nothing herein shall be construed as a stipulation for consent by defendant to entry of judgment so as to preclude or interfere with its full right to petition the Supreme Court of the United States for a writ of certiorari to review final judgment entered herein.

Dated the 21st day of September, 1931.

Davis, Michel, Yaeger & McGinley, Attorneys for Plaintiff-Respondent. Henry S. Mitchell, John E. Palmer, James L. Hetland, Attorneys for Defendant-Appellant.

SUPREME COURT

Filed September 21, 1931.

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

SUPREME COURT

28283

JAMES M. BORUM, Respondent,

vs.

MINNEAPOLIS & ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Appellant

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Hennepin, be, and the same hereby is, in all things affirmed.

And it is further determined and adjudged that respondent herein do have and recover of appellant herein the sum and amount of fourteen thousand fifty-nine and 65/100 dollars ($14,059.65), final judgment in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed Sept. 29, A. D. 1931.

By the Court. Attest:

Grace Kaercher Davis, Clerk.

SUPREME COURT

Filed Sept. 29, 1931.

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT, 1930

28283

JAMES M. BORUM, Plaintiff-Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant-Appellant

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

SUPERSEDEAS BOND ON PETITION FOR CERTIORARI TO UNITED STATES SUPREME COURT

Know all men by these presents that we, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, as principal, and National Surety Company as surety, are held and firmly bound unto James M. Borum, plaintiff-respondent above named, in the sum of Fifteen Thousand Dollars ($15,000.00) lawful money of the United States, to be paid unto the said obligee, his heirs, legal representatives, or assigns, for which payment well and truly to be made we bind ourselves, our successors, legal representatives and assigns, firmly by these presents.

Signed and Sealed by us this 30th day of September, 1931.

The condition of this obligation is such that, whereas the said Minneapolis, St. Paul & Sault Ste. Marie Railway Company, defendant-appellant above named, will petition the Supreme Court of the United States for a writ of certiorari to review the judgment in said action entered in the Supreme Court of the State of Minnesota on September 29, 1931, in favor of said plaintiff-respondent, and against said defendant-appellant in the sum of Fourteen Thousand Fifty Nine and 65/100 Dollars ($14,059.65).

Now, therefore, if said defendant-appellant, principal herein, shall pay all costs and charges which may be awarded against it on said petition and proceedings had thereon and shall further pay and discharge said judgment in case said petition for certiorari be denied; or if granted,

said judgment shall be affirmed; this obligation shall become void; otherwise to be and remain in full force and effect.

Minneapolis, St. Paul & Sault Ste. Marie Railway Company, by G. W. Webster, Its Vice-President. C. S. Pope, Its Secretary. (Seal.) National Surety Company, by James N. Hughes, Its Attorney-in-Fact. (Seal.)

In presence of Francis Lewis, C. W. Arine, L. Simonick, C. K. Roban.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 30th day of September, 1931, before me personally appeared G. W. Webster and C. S. Pope, to me personally known, who, being by me each duly sworn, did say on oath: That they are the Vice President and the Secretary respectively, of the Minneapolis, St. Paul & Sault Ste. Marie Railway Company, the corporation described in and which executed the foregoing instrument; that the seal affixed to said instrument is the corporate seal of said corporation; that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors; and said G. W. Webster and C. S. Pope each acknowledged the said instrument to be the free act and deed of said corporation.

C. W. Arine, C. W. Arine, Notary Public, Hennepin County, Minn. My Commission Expires Jan. 12th, 1932. (Seal.)

SUPREME COURT

Filed September 30, 1931.

Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA,
County of Hennepin, ss:

On this 30th day of September A. D. 1931 before me appeared James N. Hughes to me personally known, who being by me duly sworn did say that he is the attorney-

in-fact of the National Surety Company, the corporation described in and who executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its board of directors and said James N. Hughes acknowledged said instrument to be the free act and deed of said corporation.

P. J. Nelson, P. J. Nelson, Notary Public, Anoka County, Minn. My commission expires May 14, 1935. (Seal.)

STATE OF MINNESOTA:

IN SUPREME COURT, 1930

28283

Arbitration under Chapter 81, General Statutes, Minnesota, 1923

JAMES M. BORUM, Plaintiff-Respondent,

vs.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, Defendant-Appellant

PRÆCIPE

To the Clerk of the Supreme Court of Minnesota:

You are hereby respectfully requested to make a full and complete transcript of the entire record and proceedings in this cause to be used in an application to the Supreme Court of the United States for a writ of certiorari to review said cause; said transcript to consist of:

The Record.
The Opinion of the Supreme Court of Minnesota.
Petition for Stay, and Order Staying Proceedings.
Stipulation as to Entry of Judgment.
Final Judgment in the Supreme Court of Minnesota.
Bond on Petition for Certiorari.

Clerk's Certificate to the Complete Record in said Cause.
Præcipe.
Dated September 29, 1931.
Henry S. Mitchell, John E. Palmer, James L. Hetland, Attorneys for Defendant-Appellant.

SUPREME COURT

Filed September 30, 1931.
Grace Kaercher Davis, Clerk.

STATE OF MINNESOTA:

IN SUPREME COURT

I, Grace Kaercher Davis, Clerk of said court, do hereby certify that the foregoing pages, numbered from 1 to 276 inclusive, are a true, full and complete transcript of the record and proceedings in the case of James M. Borum, Respondent, vs. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Appellant, 28283, and also of the opinion of the court rendered therein, as the same now appear on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Saint Paul, Minnesota, this 30th day of September, 1931.
Grace Kaercher Davis, Clerk of Supreme Court of Minnesota, by Mae Sherman, Deputy Clerk. (Seal of the Supreme Court, State of Minnesota.)

[fol. 278] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 25, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 36,399. Minnesota Supreme Court. Term No. 585. Minneapolis, St. Paul & Sault Ste. Marie Railway Company, petitioner, vs. James M. Borum. Petition for a writ of certiorari and exhibit thereto. Filed December 22, 1931. File No. 36,399.

FILE COPY

DEC 22 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA AND BRIEF IN SUPPORT THEREOF.

HENRY S. MITCHELL,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
1427 *First Nat'l-Soo Bldg.,*
Minneapolis, Minnesota,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully shows that it seeks a review by this Court of the final judgment of the Supreme Court of Minnesota, the court of last resort of that State, awarding respondent $14,059.65 damages, and affirming the judgment of the District Court of Minnesota, Hennepin County, in respondent's action under the Federal Employers' Liability Act (35 Stat.

65) to recover for injuries sustained while employed as a switchman in interstate commerce.

Summary Statement.

Respondent induced petitioner to employ him as a switchman by falsely pretending that he qualified under rules enforced for the purpose of increasing the safety and efficiency of railway operations.

For that purpose, petitioner had a rule and practice to accept no applicant for train service, unless he was under 45 years of age and obtained from the Company Surgeon a certificate of physical fitness.

Knowing this and being 49 years of age, respondent falsely represented that he was only 38, both in his application for employment and in his statement to the Company Surgeon, who, relying thereon, furnished the certificate of physical fitness upon which respondent was accepted as a switchman.

Some years later, respondent was injured at work and brought this suit against petitioner, on the theory that he was its employee within the meaning of the Federal Employers' Liability Act.

Petitioner then discovered the deception which respondent had practiced, and pleaded it in defense of his suit as preventing him from acquiring the status of an employee entitled to the benefits of the Act.

Whether respondent had that status is the sole question involved.

Reason Relied on for the Writ.

The Federal Employers' Liability Act was erroneously construed in a manner tending to defeat its

purpose and constitutional justification of increasing the safety and efficiency of interstate commerce, in holding that respondent had the status of an employee entitled to its benefits.

WHEREFORE petitioner, referring to the attached brief in support of its reasons for review, respectfully prays that this Court issue a writ of certiorari, directed to the Supreme Court of Minnesota, to certify and send to this Court a full and complete transcript of the record herein, to the end that the case may be reviewed and determined by this Court as provided by law, and that the decision of the Supreme Court of Minnesota may be reversed, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your petitioner will ever pray, etc.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
By HENRY S. MITCHELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion of the Court Below.

This was filed on September 18, 1931. It has not been officially reported. It is found at R. 250-270.

Jurisdiction.

The judgment to be reviewed was filed on September 29, 1931 (R. 273).

The parties stipulated that petitioner had paid respondent $12,500 for his injuries irrespective of the question as to its legal liability; that this question should be submitted to arbitration under Chapter 81, G. S. Minn. 1923 (which permits a review by the courts), and that the arbitrators should award respondent an additional $12,500, if they found that he was an employee of petitioner within the meaning of the Federal Employers' Liability Act (R. 1).

The arbitrators made specific findings of fact and found as a matter of law that respondent was an employee within the meaning of the Act and awarded him the $12,500 (R. 190-194, 199-202).

Petitioner moved in the State District Court to vacate the award (R. 203-206).

The State District Court confirmed the findings and award and entered judgment for that amount, holding that respondent was an employee within the meaning of the Act (R. 211-216, 219, 220).

On appeal to the Supreme Court of Minnesota petitioner assigned as error the decision of the District Court that respondent was an employee within the meaning of the Act (R. 221-224).

The Supreme Court of Minnesota affirmed the judgment of the District Court (R. 273). It held that respondent was entitled to the benefit of the Act (R. 269).

The statutory provision under which the jurisdiction of this Court is invoked is Sec. 237 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 937).

A case believed to sustain the jurisdiction is *M., St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410.

Statement of the Case.

Respondent admitted that he *habitually* misrepresented his age to railroad companies as 11 years younger than his true age (R. 84). In 1911, at the age of 39, he gave his age as 28, when he *first* applied to petitioner for employment, knowing that it then had a rule to admit no one over 35 to its train service (R. 55-57, 63). In 1912, at the age of 40, he gave his age to petitioner as 28½, when he took a written examination on its operating rules (R. 65-67). In 1917, when he was 44½, he gave his age as 34, to the Great Northern Railway Company, in obtaining employment with that company (R. 84, 87). In 1917, when almost 45, he gave his age as 34, to the Great Western Railway Company, in applying to that company for employment (R. 89, 90).

When last admitted to petitioner's service, in 1921, he gave his age as 38, being in fact 49 years old, and knowing that petitioner then had a rule against admitting men over 45 into the service (R. 69-72). In 1925, when he was 53, he gave his age as 43, when examined by one of respondent's officers for vision, etc. (R. 78, 79). In 1926, when he was 53½, he gave his age as 42½, in taking a written examination on petitioner's operating rules (R. 75-77). He never told anyone connected with petitioner his true age up to the time of his accident (R. 79). Respondent himself admitted the above misrepresentations, explaining that he was "afraid of the age limit" and wished "to get by on the age limit" (R. 60, 64, 65, 67).

The arbitrators found that respondent understood, when he re-entered petitioner's service in 1921, at the age of 49, that it had a rule or practice against accepting men over 45; that it was for the purpose of securing employment in disregard of that rule or practice that he gave his age as 38 both in his written application to the employment officer and in his written statement to the company surgeon; that such statement of his age was relied on by the surgeon in issuing a certificate of physical fitness for respondent, and that those proceedings were a regular and essential part of securing such employment with petitioner and the basis on which it accepted respondent (R. 199, 200).

They also found that it was for the purpose of promoting safety and efficiency in its railroad operation that petitioner had the rule that:

> "No person inexperienced in railroad work over 35 years, and no experienced person over

> 45 years, shall hereafter be taken into the service" (R. 193, 200).

Also, that respondent's claim that his true age was known to petitioner was not established (R. 192).

Also, that it was a general practice for men over 45 to give their age as under 45 when applying to petitioner for employment; that petitioner was aware of such practice, and had employed men over 45 temporarily (R. 199, 200).

Also, that there was an agreement between petitioner and various organizations of its employees to the benefit of which respondent was entitled, reading as follows:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted" (R. 192, 193).

Assigned Error Intended to be Urged.

The Court erred in construing the Federal Employers' Liability Act contrary to its constitutional purpose of making interstate commerce safer and more efficient, in affirming the arbitrators' finding that respondent was an employee of petitioner within the meaning of that Act, in confirming the award of damages to respondent as such an employee, and in ordering and entering judgment pursuant thereto (R. 221-224).

ARGUMENT.

Chief Justice Wilson and Justice Loring held, in dissenting, that the case is controlled by this Court's previous decision that a switchman was not an em-

ployee within the meaning of the Act, when he had obtained his employment by fraudulently procuring the required certificate of physical fitness. *M., St. P. & S. S. M. Ry. Co.* v. *Rock*, 279 U. S. 410.

Their view harmonizes with the conclusion of the Illinois Appellate Court (the Court reversed in the Rock case) that the decision against Rock precluded recovery under this Act by a switchman who obtained his employment by fraudulently suppressing the fact that he had been employed by another railroad company and injured. *Ward* v. *E. J. & E. Ry. Co.*, 259 Ill. App. Ct. Reps. 672. As that opinion is not there reported in full, copies have been furnished to the clerk of this Court.

So, too, the Texas Court of Civil Appeals held that the decision against Rock prevented a switchman from recovering under this Act when he had obtained his employment by fraudulently concealing the fact that he had worked for another railroad company and was discharged for color blindness. It was held immaterial that tests of his eyes by the company defending his suit had failed to disclose his color blindness. *Ft. Worth & D. C. Ry. Co.* v. *Griffith*, 27 S. W. (2d) 351, 354. Citing the Rock case as authority, the Court declared:

> "The safety of the traveling public is involved in a contract of this character, and for reasons of public policy it is held that the contract is void and, in effect, that appellee never became an employee of the appellant."

We see no conflict in the denial of certiorari in *Missouri Pac. R. Co.* v. *Guillory*, 283 U. S. 849. The writ

was sought to review a judgment recovered under this Act by a member of a bridge crew, for alleged error in denying a peremptory instruction against him, because his signed application for employment misstated his age. He testified that he had given his age correctly. The jury found specifically that he did not misstate it. No fraud being established, the principle of the Rock case did not apply. Moreover, there is an important difference between a man employed in construction work and one employed in train service.

The basis of the decision against Rock was the method by which he *obtained* his employment, for the Court declared:

> "We are called upon to decide whether, notwithstanding the means by which he got employment and retained his position, respondent may maintain an action under the Federal Employers' Liability Act" (p. 413).

The principle astablished seems to be that a man's obtaining of such employment by deception which frustrates his attempted exclusion by reasonable regulations for the purpose of promoting safety (which is the Act's own purpose) makes his recovery contrary to the public interest. The Court said in denying the recovery:

> 'The deception by which he subsequently secured employment set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest because calculated to embarrass and hinder the carrier in the performance of its

> duties and to defeat important purposes sought to be advanced by the Act'' (p. 414).

Of course, the deception must be substantial for that principle to apply. *De minimis non curat lex.* Falsifying one's age to the extent of 11 years is a substantial deception, particularly in train service.

Of course, too, the regulation evaded must be a reasonable one for promoting safety and efficiency, if the principle is to apply. The Rock case recognized as such the requirement which Rock evaded of a certificate of physical fitness from the company surgeon. The present respondent evaded that same requirement.

The distinction between the methods by which Borum and Rock evaded that requirement seems immaterial. Rock obtained his certificate by having another man impersonate him. It is hardly credible that the decision would have been in his favor if he had, in his own person, fraudulently misrepresented himself to the examining surgeon as having had no operation and being free from stomach ulcers and hernia. Borum procured his certificate, in his own person, by falsely pretending to the surgeon that he was under the age limit for admission. Each obtained his certificate by fraud, which in effect nullified the company's requirement of such a certificate, by procuring it through false pretenses.

Respondent also frustrated the rule against accepting men over 45 by misrepresenting his age to the employment department. In itself, that rule was a reasonable safety regulation. The testimony showed

how it is enforced by railroads in general to promote safety and efficiency by keeping down the average age of men in train service (R. 153). Switching is the most dangerous work in railroading, requiring great physical agility (R. 153, 154). Respondent himself admitted that he would not expect most men of his age to get around as quickly and take care of themselves and the safety of other people as well as younger men (R. 83).

The arbitrators found as a fact, on the evidence, that the 45-year rule had the purpose of promoting safety and efficiency (R. 200). The majority opinion of the Minnesota Supreme Court did not go to the extent of denying that it is a reasonable safety regulation, but tried to minimize the importance of Borum's evasion of it, by emphasizing that he had not reached the retirement age of 65 and that petitioner permitted other men to remain in the service until that age. That seems entirely beside the point.

Just as Borum may have worked with men of his own age whom petitioner knowingly retained in service, so, too, it has doubtless kept men in service with the same organic troubles which Rock had. There was no complaint that Rock was inefficient in his work, any more than that Borum was inefficient in his. Borum's offense did not consist in being over 45, nor Rock's in having been operated on for appendicitis and being troubled with stomach ulcers and hernia. In each case the offense consisted in the fraudulent setting at naught of regulations calculated by and large to promote the safety and efficiency of the switching service by keeping such men from *entering*.

The limited proportion of men over 45 which the service contains if men do not *enter* over that age can be fitted into relatively safe positions without undue hazard. Some positions in switching are safer than others. Switching to and from industry tracks and repair yards is safer than switching in classification yards where trains are made up and broken up, and cars ridden by the men are kicked in and out, under pressure to have trains ready on schedule time. A switchman who has the position of foreman remains comparatively safe directing a crew of two or three who actually climb cars, ride them, set brakes, etc. Especially, work by daylight is less dangerous than in the dark of night.

If the service contains an excessive number of men over 45 because of entering when older by understating their ages, the inevitable result is that older men do more dangerous work calling for younger and more active men. The company is not free to assign a switchman to safer work as and when his actual physical condition seems to call for it. It is common knowledge that existing agreements with employees' organizations authorize the men to select their positions in accordance with their "seniority" in years of service.

On entering the service a man goes to the bottom of the "seniority" list. Men higher on the list always have a prior right to the more attractive positions, even though they are younger than those below them. When respondent was injured at the age of 56, men above him on the list were still depriving him of the easier positions, leaving him to perform the harder

and more dangerous work. He was not yet a foreman, and still worked at night, in a classification yard, climbing up and down cars to set brakes and throw switches (R. 20-25).

He did not have the normal right of a switchman of 56 to a better job. At that age, a man would have no less than 11 years' "seniority rights," if he was not over 45 when he entered the service. The fact that respondent was four years over 45 on entering left him at 56 with four years less seniority rights than men that old who entered at 45, depriving him to that extent of the normal privilege of a man of his age to select a better position, whereby the risk of his accident would have been avoided.

In still another way, evading the rule against entering switching service after 45 undermines the safety of railway operations. It prevents enforcing the rule for retiring at 65. This is compulsory, unless special authority is obtained each year after reaching 65, based on contemporary physical examination, to continue from year to year, to a maximum age of 70 (R. 193, 194). Otherwise, it is considered positively unsafe for men to remain at such work beyond 65 (R. 154, 156).

The company does not know that an employee has reached 65 until this is shown by his own statement made on entering the service (R. 161). Thus a man like respondent who understated his age by 11 years on entering might remain in train service until the advanced age of 76, without the knowledge of the company, with no further physical examination, with retarded agility and sensory reactions, a menace to

the safety of himself and others. Even respondent's age of 56 may have retarded his hearing the locomotive behind him and jumping out of its way.

Respondent admitted that he understood he could remain in service, in view of his misstatement of his age, until he was 76 (R. 81). That he deliberately contemplated this is a legitimate inference from his long-continued and consistent misrepresentation of his age. Multiplication of such menaces to the safety of railway operations would naturally result from condoning his conduct.

The majority opinion emphasized the fact, known to petitioner, that men over 45 frequently understate their age in seeking admission to the service. From the standpoint of the public interest, that accentuates the hazards thus introduced and the undesirability of increasing them by condoning such offenses. From the standpoint of the offender, it hardly lies in his mouth to defend his fraud on the ground that such offenses are common. From the standpoint of the railroad company, the suggestion is that it should not be allowed to assert respondent's fraud as a defense to his suit, because it did not undertake to ascertain his true age from other sources.

In asserting that accurate information on that point was "readily available" the majority opinion ignores the facts (R. 268). When respondent gave his age in his application as 38 instead of 49, no attempt at verification by examining the records of his previous employment by other companies would have exposed his fraud. With them, too, he had consistently pretended to be 11 years younger than his true age (*supra* —).

Indeed, petitioner had to employ lawyers in Illinois, where respondent was born, and they had to resort to the family Bible, in order to ascertain the true date of his birth, when it was suspected after this suit was begun that he had falsified his age (R. 189).

Looking beyond the present case, the verification of applicants' given ages is, in general, no easy matter. Birth certificates are obviously difficult to secure, not only for men born in this country in counties where such records were not then kept, but especially for the large number of men born in foreign countries. All such considerations are ignored by the majority opinion.

The majority opinion states that petitioner "just about knew" that respondent's age was "suspicious" (R. 265). The record furnishes no warrant for that suggestion of virtual complicity by petitioner in respondent's misrepresentation. The arbitrators made a finding which remains in full force that his evidence on his claim that his true age was known to petitioner was too "unsatisfactory" to support a finding to that effect (R. 192). That he had the appearance of the age he gave is shown by the fact that the Company Surgeon, despite a rigorous physical examination, was deceived into believing his statement that he was 38 (R. 114-117).

The majority opinion attempts to distinguish the decision against Rock as based on the view that "he was not the man for whose services the defendant (railroad) contracted" (R. 265). The view that Rock's contract of employment was void because of mistake as to his identity was submitted to this Court in the

railroad company's petition for certiorari and brief after the writ was granted. When its counsel undertook to argue the point orally, Mr. Justice Holmes took issue on the ground that the company knew it was employing the man who appeared before the employing officer, namely, Rock, in spite of his altering his name and procuring through another person his certificate of physical fitness. When counsel still attempted to argue that there was an essential mistake, Chief Justice Taft intimated that he should pass to another point. When the Court rendered its decision against Rock, per Mr. Justice Butler, the doctrine of mistake was not even mentioned. All this was explained to the Minnesota court. The attempt of the majority opinion to distinguish this Court's decision as based on a ground it rejected seems somewhat uncalled for.

The majority opinion was just as clearly unsound in attempting to distinguish this case from the Rock case on the ground that respondent's misrepresentation of his age had no causal connection with his injury (R. 269). If he had not falsified his age, he would not have obtained the employment wherein he was injured. Rock's injury, also, was not directly caused by the defects he had concealed, but this Court said, and it applies equally here,

> "The misrepresentation and injury may not be regarded as unrelated contemporary facts" (p. 415).

The majority opinion was on equally untenable ground in emphasizing the basis on which the arbitrators held that respondent was an employee within

the meaning of the Act. This was petitioner's thirty-day probation rule, reading as follows:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted."

That rule was erroneously construed as meaning that no fraud in the application may be asserted after thirty days. The rule, quoted above in its entirety, obviously makes no such provision. It merely fixes the effective date of acceptance of the application, when the contract of regular employment begins. It says nothing about subsequent avoidance of the contract for subsequently discovered fraud in procuring it.

Emphasis was placed on the testimony of the chief clerk in petitioner's employment office, somewhat supported by another employing officer, that the rule meant that the applicant would be "immune from discharge" after thirty days for anything "in connection with his application" (R. 263, 264). Neither witness testified that any such construction was ever followed in actual practice. In short, neither was testifying to any fact, but giving his obviously erroneous construction of a written instrument. The judicial function of properly construing the rule cannot be avoided on the ground that a lay witness has misconstrued it.

In any event, immunity from *discharge* on account of such fraud would not necessarily include a right to recover under this Act. Assume that petitioner agreed (as it did not) not to discharge respondent, and that such agreement would be binding. The question would still remain whether it would be consistent with public

policy for the courts to recognize him as being entitled to the benefits of the Act whose purpose he defeated in obtaining his employment.

Conclusion.

In sustaining the constitutionality of this Act in *Second Employers' Liability Cases*, 223 U. S. 1, 50, 51, this Court said of its provisions:

> "The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the bases of the rights of recovery which the statute creates and defines."

That object of the Act was emphasized in the Rock case, where this Court declared (p. 413):

> "The carriers owe a duty to their patrons as well as to those engaged in the operation of their railroads to take care to employ only those who are careful and competent to do the work assigned to them and to exclude the unfit from their service. The enforcement of the Act is calculated to stimulate them to the proper performance of that duty."

The resulting implication that the Act may *not* be regarded as being *solely* for the benefit of injured employees was plainly expressed in a case cited with approval in the Rock case, *McNamara* v. *Washington Terminal Co.*, 37 D. C. Appeals, 384, 393, where the court declared that the Act

> "possesses a broader and higher object—to require companies engaged in the business of com-

> mon carrier to exercise the highest care in the selection of their employes and in the use of approved equipment, in order that the agencies of commerce may be operated not only with the greatest degree of safety to the men employed, but that people and property may be transported without loss or injury."

Nevertheless, the majority opinion of the Minnesota Supreme Court construes the Act as if the sole object were to provide compensation for men injured through the negligence of fellow employees. It disregards the purpose of impelling carriers to make interstate commerce safer through regulations like the present for maintaining a high standard of efficiency among employees conducting such commerce. The decision that rules embodying that purpose may be fraudulently evaded without any sacrifice of the right to compensation encourages such evasions. It thus makes the Act's provision for compensation defeat its own higher purpose and constitutional justification of increasing the safety and efficiency of interstate commerce.

It is respectfully submitted that the Minnesota Supreme Court erred in not following the principle of the Rock case and that the writ should be allowed.

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Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITIONER'S REPLY BRIEF.

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SUPREME COURT OF THE UNITED STATES

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PETITIONER'S REPLY BRIEF.

The often repeated assertion in respondent's brief that, according to Minnesota practice, the award of the arbitrators must be sustained if there is any evidence to support it, might prove misleading. It is true that findings of fact by arbitrators must be sustained if based on evidence. We do not question their findings of fact, but rely on them. Our contention is that the law was misapplied to those indisputable facts. The Minnesota Supreme Court held that, in a statutory arbitration such as this, the decision of the arbitrators on a question of law is not final (R. 261, 262). That decision as to Minnesota practice will be accepted by this Court.

Respondent's brief claims that he was guilty of no fraud

or misrepresentation of his age, thus seeking to make this case resemble that of *M. P. R. Co. vs. Guillory,* 283 U. S. 849, where the jury made a special finding that Guillory did not misrepresent his age and this Court denied certiorari.

That the present respondent did misstate his age is expressly admitted (Br. 28). But the brief argues that there was no "real misrepresentation" (p. 28) because petitioner knew it was a misstatement. It declares (p. 25):

> "There was *evidence* in the case which would justify a finding that there was no misrepresentation on the part of Borum, the company knowing that his 'railroad age' and his actual age differed greatly." (Emphasis ours.)

To support that assertion the brief sets forth certain portions of respondent's testimony wherein he claimed that petitioner knew he was misstating his age, ignoring petitioner's evidence to the contrary.

That betrays a failure to understand that cases are not tried here *de novo.* This Court will not consider the evidence to determine whether it *might* justify other findings of fact than those which were actually made. We recognize that we should not detain this Court with a rehearsal of our evidence demolishing respondent's claim and fully supporting the arbitrators' findings of fact.

But the assertion that the arbitrators made a finding of fact supporting respondent's claim cannot be ignored. The brief declares (p. 24) that:

> "We have a finding here by the arbitrators that there was no such fraud as to deprive Borum of his status as an employe—in other words, no misrepresentation."

On the contrary, the arbitrators made positive findings against respondent, embracing the essential elements of

fraud. That, being 49, he gave his age as 38, "knowing such statement to be untrue" and "for the purpose of securing employment in disregard of the rule" which he "understood that the defendant had" (R. 192, 199, 200). That his evidence to show petitioner's knowledge of his age was "so unsatisfactory" that they could base no finding thereon (R. 192). That his "knowingly false statement" was "relied upon" and formed, in part, the "basis" on which he was employed (R. 192, 200). The District Court affirmed those findings of fact (R. 212). The Supreme Court affirmed them in affirming the judgment of the District Court (R. 269).

Thus the arbitrators' award was *not* based upon any finding that respondent was guilty of no fraud or misrepresentation. It *was* based on their finding that, under the "thirty day rule," at the end of that time, his status "became fixed as an employe" and he then became "immune from discharge on anything in connection with his application" (R. 193, 194).

The District Court expressly recognized respondent's *fraud*, but rejected the thirty day rule as a basis for condoning it (R. 213), preferring to do so on the ground that it was not against public policy, declaring that there were no

> "circumstances connected with his *fraud* that would render a right of recovery herein abhorrent to public policy" (R. 216). (Emphasis ours.)

The statement in the majority opinion of the Supreme Court that petitioner "just about knew that his (respondent's) age was suspicious" (R. 265) does not suffice to negative his fraud, the arbitrators' findings being affirmed in affirming the judgment of the District Court (R. 269). The opinion set forth indiscriminately all the suggested

theories for sustaining respondent's recovery, without selecting any particular one for approval. But it recognized that respondent had done *wrong*, even when it emphasized (as though legally significant) the fact that he did so to get a job, referring to his "falsification of his age to get a job" (R. 269) and declaring that:

> "His wrong was in misrepresenting his age to get a job" (R. 268).

Thus respondent's *wrongful* misrepresentation of his age was established and recognized in all the Courts below.

Utterly groundless is the assertion at page 5 of respondent's brief that the arbitrators' original finding No. 9 (R. 192) (that respondent's evidence to show that petitioner knew his true age was too unsatisfactory to support a finding) was *superseded* by their supplemental finding No. 2 (R. 199) (which did not deal with petitioner's knowledge of respondent's age).

The assertion at page 6 that if respondent "did not know he was ineligible as an applicant he could not be guilty of fraud in making his application" might mislead the Court. It refers to the arbitrators' hyper-technical supplemental finding that respondent "did not know that he was ineligible as an *applicant*" (R. 199). That finding was thus explained by the arbitrators:

> "We assume anybody could apply for employment and would be eligible to seek the same. * * * While being eligible as an applicant, nevertheless under the rule enforced, he would be ineligible as an employe" (R. 201).

In other words, the finding that respondent did not know that he was ineligible as an *applicant*, did not mean that he did not know that he was ineligible as an *employe*. As to

the latter point, the finding was that respondent "understood that the defendant (petitioner) had a rule or practice against accepting men over 45 years of age" (R. 199). Of course, respondent's fraud did not consist solely in making his application containing false statements, but in obtaining employment on that basis.

It is respectfully submitted that the writ should be allowed.

HENRY S. MITCHELL,
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JOHN E. PALMER,
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Of Counsel.
January, 1932.

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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITIONER'S REPLY BRIEF.

On final hearing

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, PETITIONER,

vs.

JAMES M. BORUM, RESPONDENT.

PETITIONER'S REPLY BRIEF.

We reply to the following contentions in respondent's brief:

1. That respondent committed no fraud in misrepresenting his age.

2. That fraud in obtaining employment does not preclude a recovery for injuries, either at common law or under Workmen's Compensation Acts.

3. That misrepresentation of age is unimportant.

4. That misrepresentation of age is a common thing.

5. That there was no connection between respondent's age and his accident.

6. That respondent was absolved by the thirty day rule.

7. That the recovery is authorized by Section V of the Act.

8. That the Rock case should be overruled.

1.

THE CLAIM THAT RESPONDENT COMMITTED NO FRAUD.

Respondent's brief contradicts the arbitrators' findings of fact in asserting that the record shows his innocence of any fraudulent deception.

The claim is based on rehearsing his own testimony that some of petitioner's employes knew or suspected his true age and suppressing not only their denials but the Company Surgeon's *undisputed* testimony that he qualified respondent in reliance on the age he gave, without any reason to doubt its truth (R. 78, 82).

The insufficiency of respondent's testimony in that respect was settled by the arbitrators' ninth finding of fact (R. 133):

> "9. That the evidence relied on by the plaintiff as to the knowledge possessed by the defendant of plaintiff's age at the time plaintiff sought employment was so unsatisfactory as bearing upon the question of estoppel, that the arbitrators have been unable to make any finding thereon."

To escape from that finding respondent's brief misrepresents it as a finding against *petitioner*, baldly asserting that it is a finding that "the *only defense* of the carrier is unsatisfactory" (p. 17).

The brief squarely asserts that "No tribunal found any fraud in this case" (p. 33). We briefly summarize the find-

ings that he *was* guilty of fraud. The arbitrators found that being 49 he gave his age in his application as 38 "knowing such statement to be untrue" and "for the purpose of securing employment in disregard of the rule" which he "understood that the defendant had" (R. 132, 138). That he also made a "knowingly false statement of his age" to the Company Surgeon which was "relied upon" by the latter in "issuing a certificate of physical fitness required by the defendant of employes entering its train service" (R. 138). That the foregoing formed, in part, the "basis" on which petitioner gave him employment (R. 138).

Those findings were affirmed by both the District Court and the Supreme Court (R. 146, 172). The District Court referred *eo nomine* to respondent's fraud, in declaring that there were no circumstances "connected with his fraud" which would render a recovery abhorrent to public policy (R. 149). The Supreme Court did likewise in declaring that "His only wrong or fraud was in misrepresenting his age to get a job" (R. 172).

2.

The Argument That Respondent's Fraud Does Not Preclude His Recovery.

In referring to decisions at common law and under Workmen's Compensation Acts that fraud in securing employment does not prevent a recovery for wages earned or injuries sustained in such employment, the brief overlooks the distinction established in *M. St. P. & S. S. M. Ry. Co. vs. Rock*, 279 U. S. 410, that a recovery under the Federal Employers' Liability Act should be denied where the fraud was of such a character as to render it "*abhorrent to public policy.*"

The same abhorrence to public policy which existed in that

case is found in the present case. Rock, being disqualified from entering the switching service by his *physical condition*, fraudulently obtained a qualifying certificate from the Company Surgeon. The present respondent, being disqualified by his *age*, fraudulently obtained a qualifying certificate from the Company Surgeon. If it was against public policy for Rock to recover under this Act because he had obtained his employment in that manner, it is likewise against public policy in this case.

The public interest of promoting the safety and efficiency of interstate commerce by enforcing such requirements for entering the service is not affected by the differences emphasized in respondent's brief between the subterfuges which he and Rock employed to circumvent the Company Surgeon.

The attempt in the brief (p. 27) to distinguish the decision against Rock as based on a mistake as to his identity not present in this case is clearly untenable. The view that Rock's contract of employment was invalid on that ground was submitted to this Court in the railroad company's petition for certiorari and in its brief after the writ was granted. At the oral hearing Mr. Justice Holmes intimated that there was no such mistake of identity as would invalidate the contract, because the Company knew it was employing the man who appeared before the employing officer, even though he had altered his name and procured his qualifying certificate through another individual. Chief Justice Taft then suggested that counsel should not continue to argue that there was a mistake of identity. When the opinion of the Court was rendered through Mr. Justice Butler it was based entirely on the ground that Rock's employment had been obtained through *fraud*.

3.

ALLEGED UNIMPORTANCE OF AGE MISREPRESENTATION.

The record does not justify the assertion in respondent's brief (p. 26) that the employing clerk testified that "they paid little attention to age." He testified that he observed "absolutely" the regulation against allowing men to enter after 45; that he accepted a man's own statement as to his age unless there was a question in his mind as to whether the man was understating it; that he would question the man "very closely" if he looked older and he would not "get by"; and that if the witness knowingly gave a man over 45 temporary employment during rush times he always laid the application to one side for rejection within thirty days to prevent the man from becoming a regular employe (R. 103, 113, 121, 127). The Company Surgeon testified that he would make a notation on his report of an applicant's physical examination if he appeared to be older than 45; and that there was no indication that respondent was older than the age he gave (R. 78, 79).

Nevertheless, respondent's brief (p. 25) argues that the misrepresentation of age was *not important*. We reply that it was *highly* important as nullifying the obtaining of a qualifying certificate from the Company Surgeon; the regulation for retirement at the age of 65; the rule against entering after 45; and the routine whereby an older man obtains a safer position.

(1) *Nullifying the qualifying certificate of the Company Surgeon.*

Any substantial misrepresentation by an applicant to the Company Surgeon, which procures from him a qualifying

certificate that he would not otherwise furnish, nullifies *pro tanto* the requirement of such a certificate for entering the service, breaking down the protection thus afforded to the safety and efficiency of interstate commerce. That was the gist of Rock's offense.

(2) *Nullifying the regulation for retirement at 65.*

An understatement of a man's age in his application certificate tends to keep him in service after the age fixed for retirement. Existing regulations require a man to be retired at 65, unless he passes a physical examination each year thereafter showing that it is safe to retain him in service, whereby retirement may be postponed to a maximum age of 70 (R. 79, 106, 111, 133, 134). It is definitely unsafe for himself and others for a man to remain in this service after 65 without such further examinations, because of the probability of dangerous physical defects then developing within him (R. 106). In enforcing retirement at 65 the Company is guided solely by the age a man gave in his application (R. 111). For instance, this respondent, having understated his age by 11 years in his application, could have remained in service until he reached the advanced age of 76, before the Company's records would show him to be 65, *as he admitted and seemingly contemplated* (R. 55, 111).

(3) *Nullifying the regulation against entering after 45.*

Any substantial evasion of the regulation against entering the service after 45 is detrimental as tending to defeat its purpose. Its purpose is "to promote safety and efficiency in railway operations," as the arbitrators expressly found (R. 138). That finding was supported by ample evidence that the switching service requires great physical agility and

alertness to avoid its exceptional hazards; and that men over middle age are usually deficient in those respects in comparison with younger men, *as respondent himself expressly admitted* (R. 56, 57, 75, 76, 105, 106).

Respondent's brief suggests that petitioner is precluded from asserting that it is important to keep men from *entering* the service after 45 because of allowing those who entered under 45 to *remain* in the service after they pass that age. But there is no inconsistency.

There is, of course, in the switching service a limited number of positions which are safer than other positions. For instance, as supervising foremen rather than as more active workers, or in day work rather than night work, or in switching to and from industry tracks rather than in classification yards. Those safer positions are available for men who entered the service under 45 and remain after that age, as they become less qualified for the more active and dangerous work. In view of the limited number of safer positions which are available for them there is no inconsistency in petitioner's attitude that a limited number and no more of men over 45 can be safely retained in service.

(4) *Nullifying the routine whereby an older man obtains a safer position.*

The routine is based on the well-known "seniority" rule, which the railroads are bound by agreement with the Brotherhoods to follow. When a given position becomes vacant, the man who stands next on the "seniority" list has a right to select it for himself. On entering or re-entering the service a man's name is placed at the bottom of that list and advances as those ahead of him die or retire. Thus his right to select a more attractive position depends on the

number of years he has been in service. Consequently, men past 45 who entered under 45 have a "seniority" standing through which they naturally fit themselves into the safer and more attractive positions; but if they had entered after 45 they would stand lower on the list and have to fill less desirable and more dangerous positions.

Respondent's own case is a good illustration. Having come into the service at the age of 49, he was only seven years from the bottom of the seniority list when injured at the age of 56. Normally, when a switchman reaches 56 he stands at least 11 years from the bottom of the list, having entered the service when not over 45. Respondent's standing on the list being thus abnormally low for his real age, he was still working at 56 as a helper, on a night shift, in a classification yard, climbing up and down cars to set brakes and throw switches (R. 12, 13, 18, 19, 20). That highly dangerous position would have been filled by a younger man, presumably more alert and more likely to escape from the emergency in which respondent was injured, if petitioner's efforts to keep men from entering the service when over 45 had not been frustrated by respondent's fraud.

The detriments to the safety and efficiency of interstate commerce thus resulting from misrepresentation of age are not eliminated by the claim emphasized in respondent's brief (p. 25) that he personally "was physically fit." If one man can practice such misrepresentation with impunity others also may do so and will be encouraged in that direction, thus undermining the protection for interstate commerce afforded by the above regulations.

4.

The Prevalence of Age Misrepresentation.

The brief suggests that since the employing clerk admittedly knows that applicants frequently misrepresent their ages petitioner assumed the risk of respondent doing so, in employing him on the basis of the age he gave in his certificate. But, even with that knowledge, railroad companies should not be charged with the responsibility of obtaining more reliable proof of an applicant's age than his own certificate.

An investigation of the applicant's own previous statements to other employers cannot be relied upon. For instance, respondent admitted that he had with his previous employers consistently adhered to the false date of birth which he gave petitioner (R. 57-63). Birth certificates are frequently impossible to secure, particularly for men born in foreign countries, or in places in this country where official birth records were not kept at the time. In the present case, for instance, when respondent's statement after his accident suggested his previous falsification of his age, in order to ascertain the truth petitioner had to employ lawyers in Illinois who obtained access to the record of his birth in the family Bible (R. 130).

From the standpoint of the public interest, the dangerous influx into railroad service of men over the proper age for entrance will be better restrained by not absolving them from responsibility for falsifying their ages, than by so absolving them on the theory that the railroad companies should be able to discover their true ages from other sources.

5.

THE ALLEGED LACK OF CONNECTION BETWEEN RESPONDENT'S AGE AND HIS ACCIDENT.

It is not established that there was no connection between respondent's age and his injury. It is possible, perhaps probable, that but for the slowing down of his sensory perceptions and physical reactions because of his age he might have heard the locomotive and jumped away in time to escape.

But, even if it be assumed that his age had nothing to do with his accident, that is of no more importance than was the fact that Rock's "physical condition was not a cause of his injuries." 279 U. S. 415.

Whatever the immediate cause of the accident, the man's own fraud procured his employment and thus brought on his disaster. As was said in the Rock case (279 U. S. 415)

> "The misrepresentation and injury may not be regarded as unrelated contemporary facts."

However, the more important question is not the cause of the particular accident, but the general effect of condoning the fraud.

6.

THE THIRTY DAY RULE.

The rule is as follows (R. 133):

> "Applications for employment in yard service not rejected in thirty days will be considered accepted."

The plain meaning of that language is that non-rejection of an application for thirty days is tantamount to acceptance, without further notice. The unambiguous language

does not call for interpretation, or for reading into it any meaning which is *unexpressed.*

But respondent's brief would read into the rule the unexpressed meaning that an employe may not be *discharged,* after thirty days, for fraud in obtaining his employment. That interpretation was adopted by the arbitrators (R. 133). The District Court expressly declined to adopt it (R. 147). The Minnesota Supreme Court seemed to accept it (R. 173, 185). Whether it should be adopted is a question of law for the Court.

Throughout this entire proceeding there has never been a suggestion that any such intention was expressed in the rule, entertained by those who promulgated it, or ever enforced in actual practice. The sole and only excuse advanced for recognizing it has been that it was assented to by two lay employes in petitioner's Employment Department, who expressed their *opinion* on cross examination that it was a proper interpretation (R. 94, 95, 117, 183).

Apart from the complete absence of any sound argument for reading that meaning into the rule, there is a valid reason against doing so.

An agreement by petitioner to condone, after thirty days, an employe's fraud in frustrating reasonable entrance requirements would amount to an abandonment to that extent of its duty to the public. Public policy demands that carriers enforce regulations of that character in order to increase the safety and efficiency of interstate commerce, as was held in the Rock case. There the Court pertinently referred to the principle that a carrier may not repudiate its "essential duties" to the public. No such repudiation should be read into its agreement gratuitously, by a forced and unnatural interpretation.

But even if it were proper to interpret the rule as an

agreement not to discharge respondent for his fraud, that would not be the same as an agreement that he might maintain such an action as the present. The question here is not whether he could have been discharged, but whether he can recover under the Federal Employers' Liability Act. The obvious hiatus between the two questions was ignored by the arbitrators, the Supreme Court of Minnesota, and in respondent's brief.

7.

THE ARGUMENT BASED ON SECTION V OF THE ACT.

Respondent's brief (pp. 20-23) argues that the 45 year limit for entrance is void under Section V of the Act, to the extent that it enables petitioner to escape "a liability created by this Act." The argument is based on the tacit assumption that the Act *does* create a liability in favor of a man in respondent's position.

Petitioner contends that respondent *never became* one of those legitimate railroad employes in whose favor the Act creates liability, because of the fraud through which he obtained employment and the conflict with public policy. If that contention be sustained petitioner is not liable to respondent regardless of Section V, for that section merely preserves against nullification such liability as the Act creates.

There is a manifest distinction between entrance regulations which would keep a man from becoming a legitimate employe, and regulations which would prevent one who became such from enforcing rights incidental to that status. Section V does not apply to the former but only to the latter.

Assume, as respondent's brief contends, that Section V gave him the right to recover despite his evasion of the en-

trance regulations. By the same token it would have the same effect in the case of such an evasion as occurred in the Rock case. Thus respondent's argument suggests, by necessary implication, that the decision against Rock should not be adhered to.

8.

The Suggestion That the Rock Case Should Be Overruled.

The attempted *distinctions* from the Rock case being insubstantial, respondent's brief culminates in the suggestion that it should be *overruled*. The brief makes an express disclaimer of such suggestion, but insinuates it nevertheless by asserting that "many lawyers feel" that the case was incorrectly decided; and by quoting from an article in the *Harvard Law Review* criticising it as unsound, inquiring whether it is "too much to hope" that it may be overruled, and proposing that, if not overruled, Congress should "overturn it by express and unmistakable provision" (Br. 27, 28, 29).

The reason advanced for not following the Rock case, either by distinguishing or overruling it, is the alleged harshness of applying its principle to cases like the present.

As for respondent himself, the harshness has been ameliorated by the fact that petitioner has paid him, regardless of legal liability, one-half of the amount considered acceptable in view of his injuries.

Of course, this case will be a precedent for other men in railroad service who may have entered, and still remain, on the false basis of representing themselves to be younger than their true ages. The brief suggests that it would be harsh to bar these men and their dependents from recovering for injuries sustained by them in their employment.

An easy remedy is apparent. These men are represented by Brotherhood officers able to initiate reasonable measures in their behalf. The following arrangement could no doubt be consummated by agreement with the railroad companies, because it would be to the companies' advantage. Notice might be given to all railroad employes that any of them who have previously obtained employment by falsifying their ages will be reinstated on the basis of their correct ages, if they will come forward and disclose their true ages. That would both protect them against the suggested harshness and minimize the dangers incident to their remaining in service on the false footing of younger men.

CONCLUSION.

The probability that a clearing up of the present situation will result from a decision against this respondent is, from the broad standpoint of public policy, a strong argument for such a decision. To an unknown extent the existing and prospective presence in railroad service of older men on a pretended basis of being younger than they are is a menace to the safety and efficiency of interstate commerce; and a decision which would tend to eliminate that menace would seem to be clearly in the public interest.

It is respectfully submitted that the judgment for respondent should be reversed.

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Counsel for Petitioner.

JOHN E. PALMER,
JAMES L. HETLAND,
Of Counsel.
April, 1932.

ADDENDUM

Dawson v. Tex. & P. Ry. Co., 45 (2d) S.W. 367.

Held, following the Rock case, that a switchman who suppressed the fact of his previous employment by another railroad company and injury could not recover under the Federal Employer's Liability Act.

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FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 585

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

JAMES M. BORUM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 5851.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Petitioner,*

vs.

JAMES M. BORUM, *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING OF A WRIT OF CERTIORARI.

THE ISSUE.

The sole issue before this court is whether a Writ of Certiorari should be granted in a personal injury action under the Employers' Liability Law where the only objection to a recovery was that the plaintiff, in order to secure employment, misstated his age.

CERTIORARI DENIED IN SIMILAR CASE.

In *Missouri Pacific R. Co. vs. Guillory.* 283 U. S. 848, 75 L. Ed. 1454, 51 Sup. Ct. 495, practically the identical question was presented to this court upon an application for a Writ of Certiorari, this court refusing to grant the Writ. We will refer to the Guillory case later under the head "Argument."

STATEMENT OF THE CASE.

The question of whether the plaintiff (Respondent here), who had lost both legs through defendant's negligence, was an employee within the meaning of the Federal Employers' Liability Law, was submitted to arbitration, pursuant to a Minnesota statute.

THE ARBITRATORS.

The arbitrators selected by the parties were Mr. M. M. Joyce, of the Minneapolis Bar, General Counsel for the Receiver of the Minneapolis & St. Louis R. Co. Mr. John P. Devaney, of the Minneapolis Bar, an attorney of extensive experience in cases involving the Federal Act, and Mr. Harry S. Stearns, of the St. Paul Bar, State Attorney for the Chicago Great Western R. Co., and State Attorney for the Chicago, Burlington & Quincy R. Co.

THE FINDINGS OF THE ARBITRATORS.

These arbitrators, representing the highest type of lawyers in the State of Minnesota, made findings of fact and arrived at conclusions of law in all things upholding the right of plaintiff to a recovery.

The essential findings of the arbitrators were as follows:

That plaintiff was employed by defendant in October, *1921,* and continued in its employment until he was injured December 11, *1928,* a period of seven years. That plaintiff was previously employed by defendant from 1911 until 1917.

That at the time plaintiff was employed in October, 1921, he was 49 years of age but in his application for employment he gave his "railroad age" which was 38 years. In his

first application in 1911, he gave his age as 28, which was his "railroad age," being 11 years under his actual age.

That plaintiff was in good health, in acceptable physical condition, performed his work satisfactorily, passed the necessary physical examination and that his application for employment was never rejected.

That there was a rule of the company that experienced persons over 45 years of age would not be taken into service. At the time plaintiff applied for employment he was 49.

That there was also a pension rule applying to employees who had attained the age of 65 years. (Such rule is of minor importance here.)

That plaintiff, Borum, was employed by defendant in interstate commerce and was an employee entitled to the benefits of the Employers' Liability Act.

That the railroad was negligent, such negligence proximately causing or contributing to his injuries.

That plaintiff's true name was at all times James M. Borum, under which name this action was prosecuted.

That neither plaintiff's age nor physical condition contributed to his injuries.

The arbitrators further found that the company had a rule reading as follows:

"*Applications* for employment in yard service *not rejected in 30 days will be considered accepted*" and that plaintiff was entitled to the benefit of this rule. Also, that his application was not rejected within the 30 day period.

The arbitrators further found in their *original* findings that the evidence as to whether defendant *knew* plaintiff's real age at the time he sought employment was so unsatisfactory that the arbitrators could not make a finding thereon (see findings of fact, Record, pages 255-256). But there was no finding that Respondent had deceived his employer.

After making the findings substantially as above set forth, the arbitrators concluded, as a matter of law, that the plaintiff was an employee within the Federal Act and entitled to recover.

SUPPLEMENTAL FINDINGS OF THE ARBITRATORS.

The railroad company, not being satisfied with the *original* findings, asked the District Court to re-commit the matter to the arbitrators for additional findings, among such requests being the following:

> "2. Whether plaintiff, at the time of making such application for employment, *knew he was ineligible* as an applicant for employment in switching service under the rules or practice of defendant and whether he made the untrue statement of his age for the purpose of securing such employment in disregard of such rule or practice" (page 258).

Upon the matter being re-committed, the arbitrators found in regard to this Request No. 2 the following:

> "2. With reference to the matters set forth in paragraph No. 2 of the court's order, the arbitrators find that the plaintiff did not know that he was ineligible as an applicant for employment in switching service under the rules or practice of the defendant; and we further find from the evidence that it was a general practice for men over forty-five years of age to state their age as being under forty-five when seeking employment of the defendant, and that the defendant was aware of such practice and that men over forty-five years had been employed by defendant in temporary service; and we further find that the plaintiff made the untrue statement of his age for the purpose of securing em-

ployment in disregard of the rule or practice heretofore designated as rule No. 16" (page 259).

The arbitrators made the following memorandum explanatory of supplemental finding No. 2:

"With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that the record shows that the following testimony was given by the plaintiff: *'They were liable to hire me over the age limit, which they have done,'* and that the record further showed the defendant's witness Pagel had testified that *the practice* of men giving erroneous ages in order to obtain employment was one which was being *'done every day'* and was *a general practice* 'in this northwest territory' with reference not only to the defendant but to other railroads as well—*we could not find that the plaintiff knew he was 'ineligible as an applicant for employment.'* We assume anybody could apply for employment and would be *eligible to seek* the same. This *eligibility* of the applicant *could mature into a regular employment* even though he were over forty-five years old *if the defendant elected to waive or modify its rule.* Having made the rule, *the defendant could, of course, waive, change or abrogate it.* While being eligible as an applicant, nevertheless under the rule enforced, he would be ineligible as an employee. We regard a substantial difference existing between one's eligibility to apply for employment and one's eligibility as an employee under a rule such as here existing where the same is enforced."

It will be noticed that supplemental finding No. 2 in effect supersedes the original finding No. 9 of the arbitrators on page 256 of the Record, which was to the effect that the

evidence as to defendant's knowledge of plaintiff's age was unsatisfactory. In the supplemental finding, the arbitrators found "that plaintiff did not know he was ineligible as an applicant for employment" (page 259).

As shown by the memorandum explanatory of supplemental finding No. 2, plaintiff testified, "they would be liable to hire me over the age limit which they have done," and the witness Pagel, defendant's chief clerk, admitted that the practice of misstating their ages by employees was a general and common one in this territory. The further finding that Borum did not know he was ineligible as an applicant has reference to the statements made by Borum to different employees of defendant that he was eleven years older than his railroad age. Reference will be made to this testimony hereafter.

If plaintiff did not know he was ineligible as an applicant, he could not have been guilty of fraud in making his application.

The arbitrators further found that the defendant "having made the rule * * * could, of course, waive, change or abrogate it" (page 260). Upon the re-commitment the arbitrators again concluded that the plaintiff *was* an employee within the meaning of the Federal Act.

AWARD OF THE ARBITRATORS SUSTAINED BY MINNESOTA DISTRICT COURT.

Under the Minnesota practice a statutory arbitration proceeding, after the finding of the arbitrators, goes to the District Court for *confirmation* and entry of judgment.

Under the law in Minnesota arbitrations are favored and the award of the arbitrators will be upheld if there is any

evidence to sustain it (see decision present case, Record, pages 260-262).

The report and award of the arbitrators came before the Honorable Gunnar Nordbye, then Judge of the District Court of Hennepin County, Minnesota, who ordered that the original award of the arbitrators and the supplemental findings and award be in all things confirmed and that judgment be entered in favor of the plaintiff (Record, page 212).

The District Court had some doubt as to the rule of the company to the effect that *applications not rejected* in thirty days *should be deemed final,* and stated that he preferred to rest his opinion upon the ground that the plaintiff was in fact an employee of the company (Record, page 213, folios 638-9). The District Court differentiated the Rock case, holding that the *abhorrent fraud* and mistake as to identity in that case *was entirely different* from the present case, *where there was no fraud* and only a misstatement of age.

The District Court further said:

> "It is inconceivable to this court that Justice Butler intended to hold in the Rock case that every fraudulent violation of the rules framed for maintaining a certain standard of safety and efficiency of the employees would render such employment void and deny the defrauding employee any rights under the act. It seems quite clear that any fraud practiced by the plaintiff herein *at the most rendered the contract voidable.* It was not void. The minds of the parties met. On account of *the general practice* of railroad men falsifying their ages in order to obtain employment—which was *well known to the defendant company*—the plaintiff may not have known that he was thereby ineligible as an applicant for employment. The rule that was promulgated by the company could be modified or waived by it. How-

ever, *the defendant company intended to hire the man that it did give employment to.* He applied in person and was examined by a physician who pronounced him physically fit to work as a switchman. Men over forty-five years of age were being *retained* as switchmen by the defendant company, and it is safe to assume, with a retiring age of sixty-five, that a majority of the men, or at least a very large number of the men, who were employed as switchmen were over forty-five years of age. If the plaintiff had *commenced* working for the defendant as an experienced switchman *before* he was forty-five years of age, his employment *at the time of the accident would have been considered wholly in accord with the rules promulgated to promote efficiency and safety.* In other words, any fraud practiced by plaintiff had *no direct effect at the time of the initial employment* or at the time of the accident *upon the safety of other employees or upon the safety of the public at large.* He was a *competent employee.* There is no claim that there was any relationship between the alleged fraud and the happening of the accident. His individual employment as a switchman at his age, while a violation of the rules framed for the general object of efficiency and safety, would *in theory only* be inconsistent with and contrary to the general purposes of the Federal Employers' Liability Act" (Record, pages 214-216).

The District Court further said that *"plaintiff's status as an employee was not a peril to defendant's patrons or to its other employees"* (Record, page 216).

AWARD OF ARBITRATORS AND JUDGMENT OF DISTRICT COURT AFFIRMED BY MINNESOTA SUPREME COURT.

The Supreme Court of the State of Minnesota, being the highest court in this state, in all things affirmed the award of the arbitrators and the judgment entered pursuant thereto by the State District Court.

The Supreme Court of Minnesota did not directly pass on the question of the effect of the rule that "Applications for employment in yard service not rejected in 30 days will be considered accepted" but did say: "However, we *accept the finding of the arbitrators,* based upon the testimony of the defendant's witnesses, that the *employee became an accredited employee* at the end of 30 days."

The Supreme Court held that the so-called "public policy" which the railroad company says should prevent a recovery under the Federal Act "was a policy declared and enforced to *sustain* the rule *not* to *require its making*" (page 268). The court further made the following significant statement: "No public policy was raised by the law in aid of the public or employees to *prevent* a man from 45 to 65 *working* as a switchman if he *entered* employment at the prescribed age."

In other words, the railroad company, in one breath, made the contention that it was dangerous to the public and to other employees to have a man over 45 years of age employed as a switchman, but, in the next breath, admitted that men between the ages of 45 and 65, and *even over the age of 65, were employed* as switchmen. The company contended that if the rule as to not employing men over 45 were enforced, there would not be "so many" men in service over 45 years of age. Therefore, the contention was that the safety of the employees "and the public" would be enhanced. The evi-

dence of defendant's own witnesses showed that if an employee switchman had reached the age of 65, *he could still continue to work as a switchman until he had reached the age of 70* if he took periodical examinations and was found to be physically fit (folio 461). There was no question but that Borum was physically fit and in good condition to do his work. In fact, the chief surgeon of the company, who examined Borum, said that *he might well be taken,* and the surgeon did take him, *for a man 38 years of age* instead of 49.

After a review of the findings of the arbitrators and of the case in general, the Supreme Court of Minnesota in all things upheld the District Court and the award of the arbitrators.

As to the company's so-called "public policy," the Minnesota Supreme Court said: "The public policy effective here did not require defendant to have or enforce such a rule. It may have had none at all. * * * *It might have waived it.* * * * The public policy upon which defendant relies was a policy declared and enforced to sustain the rule not to require its making. No public policy was raised by the law in aid of the public or employees to prevent a man from 45 to 65 working as a switchman if he entered employment at the prescribed age" (page 268).

It was further stated in the opinion of the Supreme Court of Minnesota that "*It was generally known* that railway employees in order to avoid the application of an unfavorable age rule gave a wrong age" (page 268):

> "The chief clerk testified that he took his own judgment in determining age; that he did not investigate; that it was the general practice to understate ages 'in this northwestern territory.' Again he said: 'I would not say that I know it is the practice; I believe it is an

understanding.' And again: 'I think it is done every day.' The arbitrators were of the opinion that in view of the testimony of the plaintiff that the defendant was likely to hire him though over the age limit and the common practice of understating age, the plaintiff did not know that he was ineligible to apply, though if the rule were enforced he would not be eligible as an employee; and that at the end of the thirty day period he was an accepted employee" (page 268).

As to the Rock case, upon which Petitioner relies for the granting of the Writ, the Supreme Court of Minnesota said: "The Rock case *was not intended to determine against liability upon such facts as are before us*" (page 269).

THE FACTS.

The facts in this matter have been covered in a general way in the statement of the case heretofore made but some elaboration may assist the court in getting a complete picture of the situation. It will be borne in mind that *Respondent does not deny that he gave to the company* in his application to secure employment what he called *his "railroad age,"* which was eleven years under his real age.

There was no deception in this, no fraud; the company knew his age; needed men and, as stated by the Supreme Court of Minnesota: "Times were brisk and the defendant needed men. Plaintiff had worked for it for six years some time before. He was a satisfactory worker. It was glad to have him back. It just about knew that his age was suspicious. It could have found it readily. It investigated him in other respects for five years back. The question of his age did not trouble" (pages 264-265).

In the testimony of Borum there was a refreshing frank-

ness. *There was no attempt at deception.* James Borum first went to work for the Soo Line in 1911. At that time he gave his "railroad age" (folio 101).

"Q. What do you mean by 'railroad age'?

A. Well, as a rule, you go to work on account of the age limit. I was told before I went to work for the Soo Line, that the age limit was thirty-five years, so I went to work at my railroad age, twenty-eight in 1911" (folio 101).

Before Borum went to work he had a talk with one Danforth, a yard master who had charge of the company yards at Shoreham in Minneapolis. *Borum told Danforth that his "railroad age" was 39, which was 11 years under his real age* (folio 111).

"Q. What did Mr. Danforth say to you?

A. He said, 'I will give you a slip—I will go down and see what I can do.'

Q. Did he hire you that day?

A. No.

Q. Did he say what he was going to do?

A. He said he would go down and see the superintendent" (folios 111-112).

After this conversation Borum got the slip, saw the clerk who did the employing and this *clerk told him that he thought he was too old.* We quote from the testimony of Borum:

"A. I gave him the slip, and filed an application as switchman. He got out a lot of papers, he asked what my age was, and I told him, *'My railroad age was thirty-nine,'* and he says, *'I think you are too old,'* and he sent me down to the superintendent.

Q. Did you go to see the superintendent?

A. I went to see the superintendent.

Q. Did you tell the superintendent that you were making application for work?

A. I did.

Q. What occurred there?

A. I told the superintendent—

Mr. Palmer (interrupting): The same objection is made to that. It will be understood that it is taken subject to our objection and exception.

Mr. Joyce: Yes.

Q. Just tell what talk you had with the superintendent.

A. I told the superintendent what I was there for, that I filled out an application for switchman, and *I told him that the clerk told me that he thought I was too old,* and he asked me my age, and *I told him my railroad age was thirty-nine,* and he said, *'We need men,'* and *he told me to go back up and fill out the application.*

Q. Did you go back to the clerk?

A. I went back to the clerk.

Q. Did you fill out the application?

A. I did.

Q. Did you have a talk with the clerk when you filled out the application?

A. Yes, I told him the superintendent sent me back.

Q. What did he say to you about filling out the application—the clerk?

A. He said, *'Just fill it out as near as you can, like you did the first one'"* (folios 40-41).

By "the first one" mentioned in the quotation above was meant the first application Borum made for employment, in

which he had stated his "railroad age" instead of his real age, the "railroad age" being eleven years under his real age.

Borum resorted to no fraud, to no deception. He always went under his true name, James Borum (folio 123). He gave his "railroad age" to yardmaster Danforth (folio 111) and after the employing clerk Pagel had expressed some doubt as to Borum's age, Borum went to see the superintendent, who sent him back to the clerk and Borum then made out his application for employment and the clerk told him, "Just fill it out as near as you can like you did the first one" (folio 121).

Borum did this, then went to Dr. Rishmiller, the chief surgeon of the company, submitted to a complete physical examination, passed that examination, which disclosed him to be in good physical shape, agile, able to climb cars and to do the work of railway switchmen generally (folios 124-129). The company physician accepted Borum's age as 38 when he was in fact 49 and admitted that "He had the appearance of a robust, strong man thirty-eight years of age" (folio 358).

Borum testified:

"A. I was just as supple as any young man they got over there now.

Q. At the time they told you they needed men to work there, was there considerable work in the Shoreham Yards?

A. Yes.

Q. Did you work quite regularly then for a while?

A. Yes, sir.

Q. As switchman?

A. As switchman.

Q. That was in 1921?

A. Yes, sir.

Q. Did you continue to work with the Soo Railroad from 1921 up until the time of your injury?

A. Yes, sir" (folios 43-44).

The yard foreman Danforth admitted: *"I know I told him that I could use men because I was short of men at that time"* (folio 103).

AS TO DEFENDANT'S KNOWLEDGE OF BORUM'S AGE.

Borum told the yardmaster, Danforth, that his "railroad age" was eleven years under his real age (folio 111). When he first applied for employment to the yardmaster, he was asked relative to his age and Borum said:

"A. I told him my age limit, my railroad age is 39.

Q. Did you say anything else to him?

A. *I told him I was 11 years under my real age.*"

Following this and *after Mr. Danforth had the knowledge which Borum's testimony shows,* Danforth gave Borum a slip and sent him to the employing officer, the chief clerk, and also told Borum he would see the superintendent and see what he could do about giving him a job. Later on, Danforth gave Borum a slip, told him things were "all right" and that he should see the chief clerk (folio 114). The chief clerk suggested that Borum was too old but finally accepted him.

It is to be borne in mind that Borum worked regularly from 1921 when he was employed up to the time of his injury in 1928 (folio 130).

As to the term "railroad age" Borum testified:

"Q. Now, in reference to the term 'railroad age,' what do you mean by 'railroad age'?

A. Well, it is a habit—it has always been the custom, and we all know it; a man hardly ever goes to work on his right age, with the railroad.

Q. Why not?

A. On account of the age limit" (folio 152).

As to employees giving the wrong or the "railroad age" the following appears from the examination of the witness Pagel by M. M. Joyce, one of the arbitrators:

"Mr. Joyce:

Q. In the light of your experience in the employment bureau, do you know of, or *is it a general practice of the men, giving an age other than their actual age,* for the purpose of employment on the Soo Line?

A. On the Soo Line?

Q. Yes.

A. I believe I will have to have that again.

(Previous question read.)

A. That is a general question, is it?

Q. Yes. Are you familiar, or is there such a practice, to your knowledge, of the men, in an effort to escape the rigor, possibly, of the limitation of forty-five years?

A. I believe there is; *I think it is quite general*" (folios 489-490).

On cross examination of this witness by counsel for plaintiff, the following appears:

"Q. This practice which Mr. Joyce asked you about, of men giving younger ages when they were old, and older ages when they were young, *you knew it existed practically all the time that you have worked for the Soo Line?*

A. *I know it is a general practice, yes*" (folio 493).

The testimony further discloses:

"Q. You know that *that is the general practice* in this northwest territory, and that is where you have been working for the last seventeen years?

A. *Yes, sir.*

Q. (Continuing)—for men to give ages younger than they are, when seeking employment on the railroads?

A. I would not say that I know it is the practice, I believe it is an understanding.

Q. Didn't you state to Mr. Joyce that that is a practice that you knew existed among the railroad men, to a large extent, and it was a practice?

A. *I think it is done every day, yes.*

Q. *You think it is done every day?*

A. *Yes.*

Q. In spite of the fact that you knew that—and you knew it, of course, in 1921, while you were in that department?

A. Sure.

Q. In spite of the fact that you knew that, as I understand you, you had made no investigation with reference to his age, had you?

A. I would have no occasion to.

Q. You made no investigation as to his age?

A. I did not make any investigation" (folios 503-505).

Bearing in mind that this was a statutory proceeding and that the judgment based on the award of the arbitrators, under the Minnesota practice, is to be sustained if there is any competent evidence to uphold it, there can be little question but that *the knowledge of the company as to Borum's age as* appears from what has been heretofore quoted *pre-*

cludes any idea of fraud. The award of the arbitrators and the judgment of the District Court, affirmed by the Supreme Court of Minnesota, can only be set aside if there is no evidence to sustain it.

It is, of course, a fundamental that fraud cannot be presumed. It must be proven. It must be shown. In this case, not only is there *a failure of proof of fraud,* but even the evidence on the part of the company *negatives* the idea of fraud.

There could be no fraud unless the company believed Borum to be 38 years of age when he applied for employment, instead of 49. This is the sole basis for defendant's claim. *If the evidence does not require a* finding of fraud on this question, the company's contention fails. The evidence would not *permit,* much less *require,* a finding of fraud by the arbitrators. The yardmaster Danforth, the first man consulted as to employment, was told by Borum that his "railroad age" was different from his real age. Ultimately, the yardmaster sent Borum, despite this knowledge, to the chief clerk, who was in reality the employing officer. Yardmaster Danforth said, "I know I told him that I could use him *because I was short of men at that time*" (folio 309).

Then, after Borum got to the chief clerk who had first told Borum that he thought he was too old (folio 118), the clerk sent Borum to the superintendent and the superintendent said, "We need men" (folio 120), and Borum went back and filled out the application "like you did the first one" (folio 121).

Where was the fraud? Danforth, Schutt, the superintendent, and the chief clerk Pagel *were all aware of the fact that Borum used his "railroad age."* If they knew this, *there could be no fraud.* The *only* claim of fraud is misstatement of age.

The arbitrators, on the motion to re-commit, filed a memorandum which has been heretofore referred to. In this memorandum the arbitrators stated that there was evidence to the effect that the practice of giving erroneous ages was common in the Northwest, was a general practice, and that the defendant having made a rule could waive, change or abrogate it (pages 259-260).

In the opinion of the Supreme Court of Minnesota, it was said:

> "The chief clerk testified that he took his own judgment in determining age; that he did not investigate; that it was the general practice to understate ages in this northwest territory" (page 268).

Taking the testimony of Borum as to his first talk with yardmaster Danforth regarding his age; that he went to the employing clerk who suggested he was too old; that he went to the superintendent; that the company needed men and that he was sent back to the employing clerk; that the clerk then told him to make out his application the same as he made out the first one when he had given his "railroad age" —*this evidence was certainly sufficient to sustain the award of the arbitrators to the effect that there was no such fraud on the part of the plaintiff Borum as to deprive him of the status of an employee.*

In this connection it is to be borne in mind that, under arbitration proceedings in Minnesota, *if there is any credible evidence* to sustain the award of the arbitrators, it will not be disturbed.

In order to deprive Borum of a recovery in this case, the court would have to hold that despite the evidence heretofore referred to, *showing the company's knowledge of the situation,* the mere fact, standing along, that Borum had mis-

stated his age 11 years would constitute a fraud, which would deprive Borum of the status of an employee. Such finding would have to be made *despite the abundant testimony that the company was fully aware of the facts at the time it hired Borum.*

It is doubtful if a finding of fraud could possibly be sustained under the meager testimony as to fraud in this case. Be that as it may, *clearly the evidence does not require a finding of fraud,* as a matter of law, in view of such testimony and in view of the finding of the arbitrators, the triers of fact, the finding of the Minnesota District Court and the holding of the Supreme Court of Minnesota.

THE THIRTY DAY RULE.

Reference has heretofore been made to the so-called thirty day rule applicable to defendant's employees, including plaintiff. This rule, which we will again quote for the convenience of the court, reads as follows: "Applications for employment in yard service *not rejected in thirty days will be considered accepted.*" The application of Borum was not rejected at any time.

The arbitrators, in their findings of fact, held: "That thirty days after entering defendant's service the status of the plaintiff became fixed as an employee and he was immune from discharge on anything in connection with the application" (see finding quoted in opinion of Minnesota Supreme Court, Record, page 256).

In speaking of the finding of the arbitrators in this connection, the Supreme Court of Minnesota said:

> "In short, they found that *he was an employee* within the act. The evidence of two witnesses for the de-

fendant, who were engaged many years in connection with the hiring of employees for the defendant, put this interpretation upon the rule. There was no testimony opposed" (page 262).

The yardmaster Danforth testified:

"Q. Well, as I understand it, if he was to be rejected, he would have to be rejected within thirty days from the time of his application?

A. Yes, sir" (page 263).

The employing clerk Pagel testified:

"Q. At the end of thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. HE WOULD BE IMMUNE FROM DISCHARGE ON ANYTHING IN CONNECTION WITH THE APPLICATION.

Q. On anything in connection with his application?

A. Yes, sir.

Q. As I understand it, at the end of thirty days, *his status as an employee of the railroad company would become fixed,* and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. *Yes, sir*" (page 263).

We quote the following from the testimony given by chief clerk Pagel:

"Q. If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. I presume so.

Q. And you made no effort to do that?

A. No, sir" (page 264).

This witness Pagel also admitted that he at times would employ a man who was over the age limit and that before the thirty day period had expired he would take him out of service (see testimony quoted opinion Minnesota Supreme Court, Record, page 264).

The Supreme Court of Minnesota stated that it might be that under the Rock case this rule was not of importance but "*We accept the finding of the arbitrators based upon the testimony of defendant's witnesses that the employee became an accredited employee at the end of thirty days*" (page 264). (Such "finding" is final under the rule laid down in *Mpls., St. P. & Sault Ste. Marie Ry. Co. vs. Moquin*, 51 Sup. Ct. 501; 283 U. S. 520.

ARGUMENT.

Under the head of "The Facts" above, argument and facts have almost inevitably been mixed. In fact, little is needed by way of argument in view of the evidence.

The railway company bases its claim solely on the decision in the case of *Minneapolis, St. P. & S. S. M. R. Co. vs. Rock*, 279 U. S. 766, 49 Sup. Ct. 463.

The Rock case will be distinguished hereafter. It has no application to the facts in this case as will be apparent from a mere reading of what has heretofore been said.

THE GUILLORY CASE.

In *Missouri Pacific R. Co. vs. Guillory*, 283 U. S. 848, 75 L. Ed. 1454, 51 Sup. Ct. 495, practically the same question was raised as is raised in the case at bar. In the Guillory

case this court refused to grant a Writ to review the decision of a Texas court. In the Guillory case the chief contention of the railroad company was that the case came within the Rock decision. We quote from the Petition for Writ of Certiorari made by the railroad company in the Guillory case its Point One:

> "The Court of Civil Appeals erred in holding that the District Court did not commit error in refusing to give in its charge to the jury the peremptory instruction requested by this Petitioner, which was defendant in the District Court, when the *undisputed* evidence showed that the plaintiff in his application for employment (upon which he was employed by the defendant and during the course of which employment the alleged injury to plaintiff occurred), *over his admitted signature, stated that he was thirty-four (34) years of age,* when a rule of the defendant contained in the application for employment, signed by plaintiff, provided that no person inexperienced in railway work over thirty-five (35) years of age and no experienced person over forty-five (45) years of age should be taken into the service, and *the age of the plaintiff at the time of the signing of the application for employment was forty-seven (47) years* as shown by the *undisputed evidence* upon the trial of the case, and therefore plaintiff was not entitled to a recovery for his alleged injury in his suit brought under the Federal Employers' Liability Act (U. S. Code Annotated, Title 45, Section 51, *et seq.*)."

An attempt is made in the Petition for Certiorari herein to distinguish the Guillory case for two reasons: First, because Guillory was working about a bridge. This conten-

tion is puerile in view of the fact that an employee working in connection with a bridge used in interstate commerce is within the act. *Pederson vs. Delaware, L. & W. R. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125. We will not further discuss this point.

The next contention is that the Guillory case should not be considered as a precedent for denying the Writ because in that case the jury found as a fact that Guillory did not misrepresent his age. There was such a finding in the Guillory case and the jury did make answer to a question as to misrepresentation, saying Guillory had not misrepresented his age. The *facts* were, *and this without dispute,* that Guillory was forty-seven (47) years of age but that he stated in applying for employment that he was thirty-four (34) years of age. The undisputed facts, therefore, were that there *was* a misstatement of thirteen years as to his age.

The point as to misstatement of age was presented in the Guillory case.

If, however, the finding of the jury that he did not misrepresent his age be taken as a distinguishing point, then we have in the present case, *in effect, the same sort of finding.* We have a finding here by the arbitrators that there was no such fraud as to deprive Borum of his status as an employee—in other words, no misrepresentation. We have evidence by Borum that his employing officers knew his true age; the facts and circumstances corroborate his testimony and the finding of the arbitrators, who occupied the same position as a jury, negatived any fraud or misrepresentation sufficient to deprive Borum of his status as an employee. It will be seen, therefore, that the record in behalf of Borum was stronger than the record for the plaintiff in the Guillory case.

Furthermore, we have the thirty day rule in this case which was not involved in the Guillory case, nor in the Rock case.

If there be any distinction between the facts in the present case and the Guillory case, it is all in favor of the plaintiff Borum in this case and in view of the fact that a Writ was not granted in the Guillory case, it certainly should not be granted in the present case. The "finding" of the Minnesota Supreme Court is final, under the Moquin decision, *supra*, 283 U. S. 520, 51 S. Ct. 501, 75 L. Ed. 1243.

THE ROCK CASE.

The Rock case has heretofore been referred to and we will give a very brief analysis of the opinion in that case. One of the first things to be considered is that there *was deception, deceit* and *fraud* in the Rock case, whereas, *in the present case there was no fraud or no deceit.* There was evidence in the case which would justify a finding that there was no misrepresentation on the part of Borum, the company knowing that his "railroad age" and his actual age differed greatly.

In the Rock case the respondent's name was *Joe* Rock. He obtained employment with the Soo by representing that he was *John* Rock.

Joe Rock applied for a position and was sent to defendant's physician for a physical examination. He had been treated for *ulcers* of the stomach, his *appendix* had been removed, and he had a *rupture.* His application was *rejected because of his physical condition.* In other words, the man who applied for the job was rejected because he *could not pass the physical examination.*

Later, the same *Joe* Rock, representing himself to be

John Rock, applied for employment. The *Superintendent* of the railway company was *deceived* as to the *identity* of *John* Rock and accepted him for employment. He was required, however, to take a physical examination.

Joe Rock *had already been once rejected* because of physical unfitness. He procured a man by the name of Lenhart to *impersonate him*, the said Lenhart calling himself *John* Rock. Lenhart *was physically examined* and found to be in such condition that he *could* be accepted as an employee. Because of this *deception* as to the *identity* of *Joe* Rock, because of the later claim that *Joe* Rock was *John* Rock, because Lenhart was induced to impersonate the applicant and submit to a physical examination, and because *Joe* Rock *was physically unfit to become an employee* of the railway company, it was *deceived* into giving *Joe* Rock employment.

The Supreme Court of the United States said that the railroad company had the right to require applicants to pass a physical examination. *Joe* Rock had not passed such physical examination. His physical condition was such that his application would have been rejected.

By his deception he set at naught the company's rules requiring men to be physically fit, as stated by the Supreme Court. The Supreme Court further said that such *deception* and securing of employment by the unfit was opposed to public interest and would embarrass the carrier in the performance of its duties to the public.

In stating the reasons for rejecting the claim of Rock, who was injured under circumstances creating a liability, Mr. Justice Butler said: "It was at all times his duty to *disclose his identity* and *physical condition* to" the railway company. It was further said that "as a result of his concealment his status was at all times wrongful and a fraud

upon the railway company." This was the basis of the decision.

In other words, *deception and fraud* constituted the entire basis for holding that Joe Rock was not an employee within the Federal Act.

He deceived the railway company:

1. As to his *identity.*
2. As to his *physical condition.*
3. By securing one *Lenhart* to take *a physical examination* for the *alleged John* Rock, who was in fact *Joe* Rock.

The misrepresentation, deceit and concealment continued during his employment.

THE BASIS OF THE DECISION.

The Rock case is based on fraud and deception. It is stated in the syllabus that where a railroad employee obtains his position *"by means of deception and fruad,"* he cannot come within the Act.

In the Rock case, there was *deception* from the very start. There was *a rejection of the applicant* because of his physical condition. There was a *substitution* of still *another person* to take the *physical examination* for the alleged John Rock. The Supreme Court was very careful to point out in its opinion that the railway company was deceived as to the *identity* and *physical condition* and that because of this deception, employment was secured.

Mr. Justice Butler said:

> "It was at all times his duty to *disclose his identity and physical condition* to petitioner."

Borum did not hide his identity. He submitted to a physical examination. He was able to do his work properly.

The Rock case was never intended to apply to a case of *mere misstatement of age.* If so, a misstatement of a day or a month might deprive an employee of a right of recovery. In the brief of Petitioner, it is admitted that the misrepresentation must be substantial. Misstatement of days, months or years would not be substantial and would be of little consequence unless, because thereof, something in the employee's condition, due to his age, contributed to his injury. *It was specifically held by the arbitrators in this case that the work of Borum was satisfactory and "that neither his age nor the physical condition of the plaintiff contributed to his injury"* (Record, page 256).

NO FRAUD—NO MISREPRESENTATION.

Under the finding of the arbitrators, *based upon credible evidence, there not only was no fraud* but there was no real misrepresentation of age in this case. There was a *misstatement* of Borum's age, his "railroad age" being eleven years under his real age. Under the evidence the arbitrators could and did find that *there was not sufficient evidence of fraud or misrepresentation* to deprive him of his status as an employee.

If, under the Minnesota practice, there is *any evidence to sustain the award of the arbitrators,* it will not be disturbed. The District Court and the Supreme Court of the State both sustained the award and we submit that no question is now presented to require this court to grant the Writ sought.

CONSIDERATION OF THE PETITION FOR CERTIORARI.

Under the heading "Summary Statement," it is said by the railroad company that Borum was employed because he "falsely" pretended that he qualified as an employee. From what has heretofore been said, it is clear that this statement is not correct. It is, in effect, negatived by the finding of the arbitrators and the courts which upheld such finding. It is further said, under the same heading, that after Borum brought the suit "Petitioner *then* discovered the deception which Respondent had practiced." Under the evidence heretofore referred to *the railroad company knew of Borum's age from his statement to the yardmaster Danforth*, to the Superintendent and to the employing officer Pagel. Furthermore, the custom of misstating age was a general one, which was well-known to defendant, as admitted by its chief clerk Pagel.

An extremely misleading statement appears on page 6 of the Petition. We do not believe that such a misleading statement to this court on a Petition for Certiorari should go unchallenged. It is stated with reference to Borum: "He never told anyone connected with Petitioner his true age up to the time of the accident." To sustain this, Record, page 79 is quoted, reference undoubtedly being to folio 236, where a leading question on cross examination by railway counsel would justify this statement. However, on re-direct examination it appears that the witness did not have in mind his talk with the yardmaster Danforth in making this answer. The Record shows the following as to Borum's conversation with Danforth:

"By Mr. Davis:

Q. What else did you say, if anything, about your age?

A. I told him my age limit, *my railroad age is thirty-nine.*

Q. Did you say anything else to him?

A. *I told him that I was eleven years under my real age*" (folio 111).

On re-direct examination of Borum, the following took place:

"Q. Mr. Palmer asked you the question, if, when you made these statements, you stated to anybody connected with the Soo Line any different age than your railroad age, and you testified that you did not in response to that question. But you also testified that you told Mr. Danforth that you were eleven years older than your railroad age. When you answered him 'No,' did you understand that he had any reference to Mr. Danforth at all?

Mr. Palmer: That is objected to. He did not testify that he told Mr. Danforth any number of years difference in his age.

Mr. Stearns: I don't think he testified that he told Mr. Danforth his true age.

Mr. Davis: I think if you will go back in the record, you will find that he testified that he said he was eleven years—that his true age was eleven years more than his railroad age.

Mr. Joyce: I have the notes here on that, that he told him that he was eleven years older than my railroad age.

By Mr. Davis:

Q. *Did you tell Mr. Danforth that?*

A. *Yes.*

Q. When you answered Mr. Palmer's question, you did not have reference to Mr. Danforth?

A. No" (folios 285-287).

The testimony of Borum on direct examination, taken from page 37 of the Record, folio 107, is as follows:

"Q. Did you say anything else to him?

A. *I told him I was eleven years under my railroad age*" (folio 111).

Under the heading "Argument" and on page 9 of the Petition in reference to the Guillory case, Petitioner says: "No fraud being established the principle of the Rock case did not apply."

There was no fraud in the case at bar. Fraud was not established as a matter of law, and in view of the evidence of Borum that defendant *knew his real age,* in view of the evidence of defendant's chief clerk that men *customarily gave their "railroad age"* instead of their real age, in view of the *finding of the arbitrators* that there was no fraud sufficient to deprive Borum of his status as an employee, which was sustained by the courts, how can it be said that fraud has been established as a matter of law? And all the time it must be borne in mind that *if there is any evidence to sustain the finding of the arbitrators,* under the Minnesota practice, the award will be upheld.

Another misleading statement appears in the Petition for the Writ at page 15 as follows: "Indeed Petitioner had to employ lawyers in Illinois where Respondent was born and they had to resort to the family Bible in order to ascertain the true date of his birth when it was ascertained after this suit was begun that he had falsified his age." To sustain this statement, the testimony of John E. Palmer, one of

counsel for the railroad company, is referred to on page 189 of the Record.

There was *no attempt at deception* by plaintiff Borum. He testified on direct examination that he gave his "railroad age," *i. e.,* his date of birth as 1883 (folio 122). In answer to a question by arbitrator M. M. Joyce, he stated that he actually was born in October, 1872 (folio 148). *There is no evidence of any deception whatever.* In fact, *in the Reply in this case,* appearing at pages 14 to 17 of the Record, *it was specifically alleged that Borum's age was more than thirty-nine (39) when he secured his employment* and that *"plaintiff and defendant both fully understood and agreed that plaintiff's age was more than thirty-nine years, but that at the instance and request of defendant, this plaintiff did state his age to be thirty-nine years* at the time of so securing such employment."

It will be remembered that the employing clerk, Pagel, told Borum to fill out his application the same as he did the first one in which his "railroad age" was given, being eleven years younger than his real age. The statement that the company had to employ lawyers in Illinois to ascertain the date of Borum's birth seems doubtful. *The Reply admitted that his age as given in his application was different than his actual age* and there never was any controversy as to his real age.

On pages 18 and 19 of the Petition, it is in substance stated, in effect, that the purpose of the Employers' Liability Law was to make interstate commerce safer and that the real object of the law was *not* to provide compensation for injured men.

This point needs little argument. However, a reference to proceedings preliminary to the passage of this act, together with the various Safety Appliance Acts by Congress,

will clearly show that the object was to prevent great loss of life and limb to railroad employees.

When the Employers' Liability Law did away with the fellow-servant rule, it was not for the purpose of making interstate commerce safer but it was for the purpose of providing compensation for injured employees. When contributory negligence was done away with as an absolute defense, it was for the purpose of aiding the employees in obtaining recovery in case of injuries. When assumption of risk was done away with in cases of statutory violation, this was also for the benefit of employees. Further discussion as to the purpose of the Act is unnecessary.

CONCLUSION.

While we realize that the failure to grant a Writ of Certiorari in the *Guillory Case*, 283 U. S. 848, does not import an opinion by this court as to the merits of that case, nevertheless, if under the facts as they there appeared, a Writ should not have been granted, clearly it should not be granted in this case, where the evidence is *stronger in plaintiff's favor* than it was in the Guillory case.

This case does not involve fraud. It merely involves a misstatement of age made by Borum when he sought employment, after which he worked for the company for seven years. The case is not governed by the Rock case. Congress never intended that such a mere misstatement could deprive an employee of his status as such. Should this court hear this case on the merits it could only decide that the arbitrators and the Minnesota courts were correct in holding that Borum was an employee within the Act.

No matter of great public interest or concern is involved. The courts, with a practical unanimity, have held that such

minor misrepresentations could not defeat a recovery. (*Payne vs. Daugherty,* 283 Fed. 353.) The granting of the Writ would determine no question of law that has not, in effect, been previously determined. It would merely result in delaying compensation to a man who lost both legs through the negligence of his employer.

The evidence fails to show fraud as a matter of law. *There is evidence to sustain the finding of the arbitrators* and the judgment of the Minnesota courts. No reason has been shown for this court to take jurisdiction of this cause and the Petition for the Writ should be denied.

Respectfully submitted,

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FILE COPY

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Supreme Court of the United States

OCTOBER TERM, 1931.

No. 585.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Appellant*,

vs.

JAMES M. BORUM, *Appellee.*

APPELLEE'S BRIEF.

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No. 585.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, *Appellant,*

vs.

JAMES M. BORUM, *Appellee.*

APPELLEE'S BRIEF.

Heretofore Appellee, as Respondent, presented a brief in opposition to the granting of a Writ of Certiorari herein. In that brief such facts were stated as were deemed sufficient to present the question then for determination by this Court.

In the consideration of the case on the merits we feel that a more complete statement of facts might be helpful and that some further views should be expressed as to the merits of the controversy. With this in view we now direct the Court's attention to the following:

STATEMENT OF THE CASE.

Appellee Borum, the plaintiff below, while employed as a switchman for Appellant, lost both his legs because of the undisputed negligence of his Employer.

A dispute arising as to whether the doctrine of the *Rock*

Case, 279 U. S. 410, would bar a recovery, the matter was submitted to Arbitrators for determination under the Minnesota practice. Borum, in securing employment, misstated his age eleven years.

The Arbitrators held, in effect, that the Rock case did not apply and that Borum was an employee within the meaning of the Federal Employers' Liability Act (581).

The District Court, under the Minnesota practice, affirmed the award of the Arbitrators and judgment was entered thereon.

Upon appeal the Supreme Court of Minnesota affirmed the judgment. The case, therefore, comes before this Court with the unanimous decisions of the lower tribunals in Appellees' favor.

SUPPLEMENTAL FACTS.

The facts as here given are in addition to and supplement the facts as stated in our Brief in Opposition to the Granting of the Writ of Certiorari.

BRIEF RESUME OF FACTS.

Briefly stated, the facts as to plaintiff's employment were as follows:

Borum was 49 years of age (574).

His "railroad age" was 38 (574).

Borum applied to the yardmaster, Danforth, for a job in 1921 (102-103).

Borum told Danforth his "railroad age" was 38, but that he was 11 years older than his railroad age (111).

Danforth said he would see the Superintendent and see what he could do (111).

In a few days, Borum returned. Danforth gave him "a slip" of paper, which he took to the Employing Clerk (112-114).

The Clerk was suspicious about Borum's age, told him he looked too old and sent him back to the Superintendent (118-121).

Borum told the Superintendent his "railroad age" was 38 (120).

The Superintendent said he needed men and sent Borum back to the Employing Clerk (120).

The Employing Clerk then told Borum to fill out the application like he had when he was previously employed by the carrier in 1911. In this first application Borum gave his railroad age, which was 11 years under his real age. He also gave his "railroad age" in the second application.

After this, Borum (121) took the physical examination, was found to be physically fit and to have the physical attributes of a man 38 years of age (123) (358).

Borum then went to work and *worked regularly for seven years as a switchman* and until the date of his injury.

Neither his physical condition, his age nor anything in connection with the application for employment had anything to do with his injury (Finding No. 11 of Arbitrators, 576).

LIABILITY UNDISPUTED.

Subject to the claim of the carrier that Borum was not an employee because he had misstated his age liability was undisputed. Upon the hearing, plaintiff simply made a *prima facie* case of liability which defendant did not contest.

INTERSTATE COMMERCE ADMITTED.

It was conceded that Borum was engaged in interstate commerce, if he was an employee within the meaning of the Act.

THE THIRTY DAY RULE.

A rule of the Company provided:

> "Applications for employment in yard service not rejected in thirty days will be considered accepted" (576-577).

THE EMPLOYMENT RULE.

The Company had a rule as follows:

> "No person inexperienced in railroad work over thirty-five years, and no experienced person over forty-five years, shall hereafter be taken into the service" (578).

These rules applied to an employee such as Borum.

BORUM'S EMPLOYMENT ACCEPTED.

Borum's application for employment was *not* rejected within thirty days but he worked seven years after being employed.

CUSTOMARY FOR EMPLOYEES TO MISSTATE AGE OR GIVE "RAILROAD AGE."

The practice and custom of employees to misstate their age or to give what they called "railroad age" was common in Minnesota and the Northwest territory. This practice was known to the Employing Officers of the carrier (489-490-493).

The evidence relative to the knowledge of the carrier as to this practice will be referred to in more detail hereafter.

The Arbitrators found the practice to be general "and that the defendant was aware of such practice" (Supplemental Finding No. 2) (597).

BORUM DID NOT INTEND TO DECEIVE. HE FOLLOWED THE PRACTICE AS TO "RAILROAD AGE."

Borum testified on cross examination that he did not intend the railroad company to believe from his application that the age he gave was his true age but that it was his railroad age (174, 177).

> "Q. What did you intend that they should believe?
>
> A. To believe it is my railroad actual age—my age in the railroad" (178).

When asked if he wrote in the date as the date of his birth, Borum said:

> "A. My railroad birth" (187).

He further testified:

> "A. No; that is my railroad age, right there (indicating)—1883. That is not my actual age.
>
> Q. It is eleven years younger than your actual age, isn't it?
>
> A. Yes, sir.
>
> Q. You knew that Dr. Rishmiller would not pass you if you stated your true age, didn't you?
>
> A. No, I did not know that; I did not know what he would do" (188).

Borum further said that he did not know he would not be accepted as an employee if he were in his fiftieth year (216).

He testified that he got his knowledge of the rule in question from other switchmen and not from headquarters (213).

"Q. You knew that if you told them that you were in your fiftieth year, that you would not be taken into the service, didn't you?

A. No, I did not know that, no.

Q. You suspected that?

A. They were liable to hire me over the age limit, which they have done" (216).

He stated that he only wanted to convey by his application his railroad age (228).

"A. That has been my railroad age ever since I went railroading" (230).

Other than the general giving of his railroad age, it was not Borum's intent to deceive.

"Q. You did not want to tell the company any different, did you?

A. *If they had asked me, I would*" (230).

On cross examination of Borum by counsel for the railroad company, the following appeared:

"Q. You understood, when you made this second application in 1921, that if your application was not rejected within thirty days, that it would be considered accepted, and that your rights would attach as a switchman, didn't you?

A. Yes, according to the schedules.

Q. You knew that you could not be discharged after that thirty days except on written charges made against you, and a full hearing, at which you could have present some other employee of your choice to represent you, that is right, isn't it?

A. That is right" (238-239).

In connection with the above, *if Borum could not be discharged,* would it not be an anomaly to say that he was *not* subject to discharge *but at the same time was not* an employee?

THE CARRIER PAID LITTLE ATTENTION TO AGE LIMITS.

Danforth, the yardmaster, who first talked to Borum regarding employing him, said he never gave the matter of his age a thought (315).

Danforth knew Borum back in 1911 when he formerly worked for the Soo Line (325). He must have had some idea of his age.

The witness Pagel, the chief clerk, said it was his duty "to supervise the employment of all classes of help" (437).

He said he did not believe he told Borum to fill out his second application like he did the first one (444). He made no investigation as to Borum's age (503-505).

Pagel testified that he was not sure but thought he had sent Borum to the Superintendent, as Borum had testified (494-495).

He did not have any recollection of telling Borum he looked too old but stated that he could not remember the conversation he had as to Borum's age (496, 498-499).

Ordinarily, he would take the application as to age to be correct (501-502).

In spite of the fact he knew the practice as to giving the so-called railroad age, he made no investigation as to the same (504-505).

He did not make a practice of ascertaining ages (506). He made no inquiry at all about Borum's age (507).

KNOWLEDGE OF COMPANY AS TO MISSTATEMENT OF AGE—THE PRACTICE.

The finding of the Arbitrators that the Company knew of the practice of men to misstate their age is borne out by this testimony brought out by questions of M. M. Joyce, one of the Arbitrators.

"Mr. Joyce:

Q. In the light of your experience in the employment bureau, do you know of, or is it a general practice of the men, giving an age other than their actual age, for the purpose of employment on the Soo Line?

A. On the Soo Line?

Q. Yes.

A. I believe I will have to have that again.

(Previous question read.)

A. That is a general question, is it?

Q. Yes. Are you familiar, or is there such a practice, to your knowledge, of the men, in an effort to escape the rigor, possibly, of the limitation of forty-five years?

A. I believe there is; I think it is quite general" (489-490).

On cross examination of this witness by counsel for plaintiff, the following appears:

"Q. This practice which Mr. Joyce asked you about, of men giving younger ages when they were old, and older ages when they were young, you knew it existed practically all the time that you have worked for the Soo Line?

A. *I know it is a general practice, yes*" (493).

This Employing Clerk further said:

"Q. (Continuing.) You know that that is the gen-

eral practice in this northwest territory, and that is where you have been working for the last seventeen years?

A. Yes, sir.

Q. (Continuing.) —for men to give ages younger than they are, when seeking employment on the railroad?

A. I would not say that I know it is the practice; I believe it is an understanding.

Q. Didn't you state to Mr. Joyce that that is a practice that you knew existed among the railroad men, to a large extent, and it was a practice?

A. *I think it is done every day, yes.*

Q. *You think it is done every day?*

A. *Yes.*

Q. In spite of the fact that you knew that—and you knew it, of course, in 1921, while you were in that department?

A. Sure.

Q. In spite of the fact that you knew that, as I understand you, you made no investigation with reference to his age, had you?

A. I would have no occasion to.

Q. You made no investigation as to his age?

A. I did not make any investigation" (503-505).

There is no evidence in the record nor was any claim made by counsel that the practice of misstating ages or the employees giving "railroad ages" was not general in this Northwest territory. *Neither did the Employer deny that it had knowledge of that practice.*

From 1901 up to the time of the hearing there was no change in the policy as to not investigating ages of applicants for employment (545).

The employment clerk also admitted that he might temporarily put a man to work *even if he were fifty years of age.*

"Q. Now, you say 'temporary work'; if a man puts down his true age, advising you that he is over the age, you say he might be employed for temporary work in times of stress for men, what do you mean by that, Mr. Pagel?

A. Well, if a man comes in and wanted a job, and I asked him how old he was, and he said, '*I am fifty years old*,' if he could pass the doctor's examination, *I would put him to work temporarily*, but I would put him out inside of thirty days.

Q. What do you do in a case where a man, for instance, discloses his true age, and he is over age, and you employ him for thirty days, how do you handle his application in that case?

A. *I put it to one side, and within thirty days—I take probably the twenty-ninth day—I would take him out of the service*" (550-551).

Mr. Curtis, who was assistant superintendent (552-553), stated that Danforth, the yardmaster, may have talked to him about Borum's re-employment and he, Curtis, may have forgotten it (561). He had no recollection of Borum coming to see him (562).

THE THIRTY DAY RULE.

One of the Arbitrators, Mr. Joyce, asked certain questions of the superintendent of employment regarding the status of the employee after the thirty day period:

"Mr. Joyce: Mr. Schutt, this record shows that

Mr. Borum went back to work in 1921, the second time, and that he was hurt in December, 1928; *he was there approximately some seven years.* Assuming that a few days before this accident you had discovered that he was eleven years older than he had told you, and, assuming, also, that his work was satisfactory throughout that period, as indicated by the testimony of Mr. Danforth, what would you have done on the obtaining of that information?

A. *I don't think that anything could have been done at that time.* We have got to get at that *in accordance with our agreement with the organizations*—why, you have got to discover anything of that kind within a certain limit, and that does not cover years; it covers months.

Mr. Davis: Thirty days, Mr. Schutt?

(No answer.)

Mr. Joyce: Assuming that you had employed a man outside of the organization who was not bound by the contract with the organization, and that same information would come to you, what would you have done under those circumstances?

A. Oh, I don't know; that is a question.

By Mr. Davis:

Q. If he did his work all right, you would let him stay, wouldn't you?

A. *If he was desirable*—it just depends upon *whether he is desirable or undesirable.* If he lied about his application, that would be enough; we would try to get rid of him; we would get rid of him if we could.

By Mr. Palmer:

Q. *Well, as I understand it, if he was to be rejected,*

he would have to be rejected within thirty days from the time of his application, Mr. Schutt?

A. *Yes, sir*" (410-414).

The witness Schutt, on cross examination, testified that after the end of the thirty day period of employment, he "*would retain his status as an employee*" (427).

The chief clerk of the defendant, who was, in effect, the employing officer, testified relative to the thirty-day rule:

"Q. At the end of the thirty days, under article 22, he would then be immune from discharge, except for a violation of the rules and a hearing, would he not?

A. *He would be immune from discharge on anything in connection with the application.*

Q. On anything in connection with his application?

A. Yes, sir.

Q. As I understand it, *at the end of thirty days, his status as an employee of the railroad company would become fixed*, and he could not lose that employment because of anything that occurred in the application; that is correct, isn't it?

A. *Yes, sir*" (510).

"Q. At the end of the thirty days, he could not lose his status as an employee of the Soo Line Railroad Company, except for a violation of the rules, or failure to perform his work, and on charges preferred and a hearing had, that is correct, isn't it?

A. *Yes, that is right.*

Q. If he had made any misstatements otherwise than as to his age and his place of birth, for instance, if you had made an investigation, you could have readily found that out in less than thirty days, couldn't you?

A. I presume so.

Q. And you made no effort to do that?
A. No, sir" (511-512).

THE FINDINGS OF THE ARBITRATORS.

These findings are set forth in the brief in opposition to the granting of the writ of certiorari. Suffice it here to say that the arbitrators found:

A mere misstatement of age by plaintiff but the evidence "unsatisfactory" as to whether defendant knew plaintiff's real age (597, 602-3-4).

No damage flowing as a result of the misstatement of age in the application.

A general practice of men to misstate their age, which defendant knew (597).

That under the thirty day rule plaintiff was immune from discharge and his status "became fixed as an employee," upon the expiration of that period (578).

That plaintiff *was* an *employee* of defendant under the Federal Employers' Liability Act (573-574).

The Arbitrators also found that defendant had in effect the so-called 45 year age limit rule (573) of which plaintiff was aware (596) and that he misstated his age for the purpose of securing employment in disregard of the rule (598).

That plaintiff did not know he was ineligible as an applicant for employment (Supplemental Finding No. 2) (597).

SUPPLEMENTAL FINDING NO. 2.

In explanation of Supplemental Finding No. 2, the Arbitrators filed the following memorandum:

"With reference to finding No. 2 herein it is the opinion of the arbitrators that in view of the fact that

the record shows that the following testimony was given by the plaintiff: 'THEY WERE LIABLE TO HIRE ME OVER THE AGE LIMIT, WHICH THEY HAVE DONE,' and that the record further showed the defendant's witness Pagel had testified that THE PRACTICE of men giving erroneous ages in order to obtain employment was one which was being 'DONE EVERY DAY' and was A GENERAL PRACTICE 'in this northwest territory' with reference not only to the defendant but to other railroads as well—WE COULD NOT FIND THAT THE PLAINTIFF KNEW HE WAS 'INELIGIBLE AS AN APPLICANT FOR EMPLOYMENT.' We assume anybody could apply for employment and would be ELIGIBLE TO SEEK the same. This ELIGIBILITY of the applicant COULD MATURE INTO A REGULAR EMPLOYMENT even though he were over forty-five years old IF THE DEFENDANT ELECTED TO WAIVE OR MODIFY ITS RULE. Having made the rule, THE DEFENDANT COULD, OF COURSE, WAIVE, CHANGE OR ABROGATE IT."

NO FRAUD.

Inasmuch as the Arbitrators had the case of *Mpls. St. P. & S. St. M. Ry. vs. Rock*, 279 U. S. 410, in mind and still found that Borum *was* an employee they must have concluded there was no actionable fraud. Otherwise their decision would have been consistent with the Rock case.

FINDINGS FINAL.

Under the Minnesota practice a judgment based on such findings can not be disturbed if there is any credible evidence to sustain it.

The findings, as affirmed, are final in this court. (*M. St. P. & S. St. M. Ry. vs. Moquin*, 283 U. S. 52, 51 Sup. Ct. 501.)

DECISION OF LOWER COURTS UNANIMOUS IN APPELLEE'S FAVOR.

The District Court affirmed the award and the Supreme Court of the State affirmed the action of the District Court.

It might be noted that one of the Arbitrators, Mr. M. M. Joyce, has recently become one of the Judges of the United States District Court for the State of Minnesota.

The award was confirmed in the State Court by Judge Gunnar H. Nordbye who, since that time, has also become a Judge of the United States District Court for the State of Minnesota.

The law questions in the case were passed on, therefore, not only by the Supreme Court of the State, but by other lawyers and judges of the highest standing.

ARGUMENT.

THE QUESTIONS FOR DETERMINATION BY THIS COURT.

1. IS A MERE MISSTATEMENT OR MISREPRESENTATION OF AGE MADE BY AN EMPLOYEE, TO SECURE EMPLOYMENT, SUCH A FRAUD ON THE EMPLOYING CARRIER THAT IN THE EVENT OF INJURY TO WHICH THE MISSTATEMENT OR THE EM-

PLOYEE'S CONDITION DID NOT CONTRIBUTE, THE EMPLOYEE CANNOT BE DEEMED AN EMPLOYEE, WITHIN THE MEANING OF THE EMPLOYERS' LIABILITY ACT, OR ENTITLED TO THE BENEFITS THEREOF?

2. IF THERE WAS, IN FACT, NO MISREPRESENTATION OF AGE BUT A MERE MISSTATEMENT THEREOF IN THE APPLICATION FOR EMPLOYMENT, AND THE CARRIER WAS NOT DECEIVED THEREBY, CAN PLAINTIFF BE DEPRIVED OF THE STATUS OF AN EMPLOYEE AND OF THE BENEFITS OF THE FEDERAL ACT?

3. IF THE EVIDENCE OF FRAUD ON WHICH THE EMPLOYER DEPENDS AS A DEFENSE IS "UNSATISFACTORY," DOES SUCH EVIDENCE FURNISH SUFFICIENT GROUNDS TO REQUIRE THE REVERSAL OF THE UNANIMOUS ACTION OF THE LOWER TRIBUNALS?

4. WAS THE PLAINTIFF'S STATUS AS AN EMPLOYEE, UNDER THE AGREEMENT BETWEEN THE UNION AND THE CARRIER, FIXED SO THAT HE WAS IMMUNE FROM DISCHARGE AFTER THE EXPIRATION OF THIRTY DAYS FOLLOWING THE DATE OF HIS APPLICATION?

5. CAN THE DEFENSE OF VIOLATION OF RULE 16 BE SET UP IN VIEW OF THE PROHIBITIONS AND PROVISIONS OF THE EMPLOYERS' LIABILITY ACT?

Questions 1, 2 and 3 are so closely related that they will be argued together.

The contention of the appellee is that a misrepresentation

of age, even if made with intent to deceive, could not prevent a recovery.

It is further contended that there was not even a misrepresentation of age, but that the misstatement appearing in the application *did not mislead the carrier,* because its officers and agents really knew, or under the circumstances should have known, that Borum was more than thirty-eight years of age.

It will be recalled that he had been previously employed in 1911. This was ten years before his second employment in 1921. The fact of having been employed so long ago as 1911, together with Borum's testimony that he told the employing clerk and superintendent his "railroad age"; that he told Danforth he was eleven years older than his railroad age, plus the admission by the employing clerk of defendant that the men generally misstated their age—these facts negative deception.

The arbitrators found the evidence as to whether defendant knew of plaintiff's age "unsatisfactory." If defendant knew Borum's age there was no fraud and no deceit. The finding is that the *only defense* of the carrier is "unsatisfactory." Evidence to sustain a claim or a defense must be more than "unsatisfactory."

Under the Minnesota rule, if there is any evidence to sustain the judgment it must be upheld. But to go further, defendant relies on fraud for its defense. The *facts* do not show fraud. The finding of the Arbitrators as to the fraud, the basis of the defense, is "unsatisfactory." The defense therefore fails.

DECISIONS UPHOLDING MINNESOTA SUPREME COURT PRACTICALLY UNANIMOUS.

The courts, with practical unanimity, have held that a mere misrepresentation of age, or some similar misrepresentation, could not deprive an employee of his right of recovery. This has been the holding in New York, Missouri, Kansas, Kentucky, the Circuit Court of Appeals of the Eighth Circuit, and many other jurisdictions.

We call attention to a few of the cases:

Hart vs. New York Central, etc., 205 N. Y. 317, 98 N. E. 493;

Matlock vs. Railroad, 198 Mo. 495, 95 S. W. 849, 115 Am. St. Rep. 481;

Lupher vs. Atchison, etc., R. Co., 81 Kan. 585, 106 P. 284, 25 L. R. A. (N. S.) 707;

Louisville, etc., vs. Lewis, 218 Ky. 197, 291 S. W. 401;

Payne vs. Daugherty (C. C. A.), 283 Fed. 353;

St. Louis, etc., vs. Brantley, 168 Ala. 579, 53 So. 305;

Ward vs. Elgin, etc., R. Co., 259 Ill. App. 672;

Qualls vs. Atchison, etc. (Cal. App.), 296 P. 645;

Lake Shore & M. S. R. Co. vs. Baldwin (Ohio Circuit Decisions, Vol. 10,333);

Kansas City M. & O. R. Co. of Texas vs. Estes, 203 S. W. 1155 (Tex.);

Galveston R. Co. vs. Harris (Tex.), 107 S. W. 108;

Baker vs. Beattie, 222 S. W. 658 (Tex.);

Hazoo & M. V. R. Co. vs. Cobb, 48 So. 522 (Miss.);

Denver & R. G. R. Co. vs. Reiter, 47 Colo. 417, 107 Pac. 1100.

Other cases are referred to in an excellent article on this subject, entitled, "Misrepresentation to Secure Employ-

ment," by Professor Maurice H. Merrill, and which appears in 43 Harvard Law Review 141, 28 Michigan Law Review 357, and 14 Minnesota Law Review 646.

A discordant note appears here and there in such cases as *Stafford vs. B. & O. R. Co.*, a decision of a lower Federal District Court, 262 Fed. 807, and *Norfolk, etc., vs. Bondurant, Adm'r*, 107 Va. 515, 59 S. E. 1091. The Illinois Appellate Court, not the highest court of that state, was of the opinion that the Rock case prevented a recovery because of a mere misstatement. (See *Ward vs. E. J. & E. Ry. Co*, 259 Ill. App. 672.) A Texas decision holds likewise, *Fort Worth & D. C. Ry. Co. vs. Griffith*, 275 W. (2d) 351.

In *Blick vs. Toye Bros., etc.*, 13 La. App. 525, 127 So. 59, the court held that a mere misrepresentation did not render the contract of employment void but only voidable.

The Rock case, upon which defendant relies, was held inapplicable in *Gango vs. Ford Motor Co.*, 250 Mich. 247, 230 N. W. 159.

A discussion of all the cases can serve little purpose. There is no question but that the general holding and the well reasoned decisions are to the effect that a mere misrepresentation, such as charged to Borum, cannot defeat a recovery. Of course, in the case at bar, there is no satisfactory evidence that there was any misrepresentation.

QUESTION 5.

WOULD THE ENFORCEMENT OF THE RULE OF THE DEFENDANT VIOLATE SECTIONS 1 AND 5 OF THE EMPLOYERS' LIABILITY ACT?

Section 1 of the Employers' Liability Act provides that "EVERY COMMON CARRIER BY RAILROAD * * *

SHALL BE LIABLE IN DAMAGES TO ANY PERSON SUFFERING INJURY WHILE HE IS EMPLOYED BY SUCH CARRIER IN SUCH COMMERCE * * * FOR SUCH INJURY * * * RESULTING IN WHOLE OR IN PART FROM THE NEGLIGENCE OF ANY OF THE OFFICERS, AGENTS OR EMPLOYEES OF SUCH CARRIER."

Section 5 of the Act provides as follows: "ANY CONTRACT, RULE, REGULATION OR DEVICE WHATSOEVER, THE PURPOSE OR INTENT OF WHICH SHALL BE TO ENABLE ANY COMMON CARRIER TO EXEMPT ITSELF FROM ANY LIABILITY CREATED BY THIS ACT, SHALL, TO THAT EXTENT, BE VOID."

Does the urging, as a shield in a lawsuit, of the carrier's rule that it will not employ men over 45 years of age offend against these two sections of the Federal Act?

Section 1 does provide that the employee can recover if he is injured while engaged in interstate commerce by the negligence of the carrier or its employees.

Borum was concededly engaged in interstate commerce. There is no question in the case but that the carrier was negligent, such negligence proximately causing Borum's injury.

There is nothing in Section 1 *in any way having to do with preliminary matters leading up to the employment* in interstate commerce. The statute says that if there is employment in such commerce and resulting injury due to negligence, the employee can recover.

Section 5 provides that any rule, which has for its purpose or intent an avoidance of liability, shall to that extent, be void.

"EMPLOYED" AND "EMPLOYEE" USED IN NATURAL SENSE.

We quote the language of Mr. Justice Pitney in *Hull vs. Philadelphia & Reading Ry. Co.*, 252 U. S. 475, 64 L. Ed. 670, as to the meaning of the words "employee" and "employed."

> "We hardly need repeat the statement made in *Robinson vs. Baltimore & O. R. Co.*, 237 U. S. 84, 94, 59 L. Ed. 849, 853, 35 Sup. Ct. Rep. 491, 8 N. C. C. A. 1, that in the Employers' Liability Act Congress used the words 'employee' and 'employed' *in their natural sense* and intended to describe the conventional relation of employer and employee. The simple question is whether, under the facts as recorded, and according to the general principles applicable to the relation, Hull had been transferred from the employ of the Western Maryland Railway Company to that of defendant for the purposes of the train movement in which he was engaged when killed. He was not a party to the agreement between the railway companies, and is not shown to have had knowledge of it; but, passing this, and assuming the provisions of the agreement can be availed of by petitioner, it still is plain, we think, from the whole case, that deceased remained for all purposes—*certainly for the purposes of the act*—an employee of the Western Maryland Railway Company only."

RULE 16 CANNOT DEFEAT LIABILITY.

The Circuit Court of Appeals of the Eighth Circuit in *Payne vs. Daugherty*, 283 Fed. 353, a case where the defense of misrepresentation was asserted, said:

> "Furthermore, this action was brought under the Fed-

eral Employers' Liability Law (35 Stat. 65 (Comp. St., ##8657-8665)), and the fault of the defendant was alleged under the Safety Appliance Acts (27 Stat. 531; 32 Stat. 943 (Comp. St. ##8605-8615)). *And in our opinion we should hold that the defense urged was not available, in view of the positive terms of sections 1 and 5 of the former act.* See *Phila., Balt. & Wash. R. R. vs. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 56 L. Ed. 911; *Chicago & Alton R. Co. vs. Wagner*, 239 U. S. 452, 36 Sup. Ct. 135, 60 L. Ed. 379; *Spokane & Inland R. R. vs. Campbell*, 241 U. S. 497, 36 Sup. Ct. 683, 60 L. Ed. 1125."

Payne vs. Daugherty, cited above, follows *Phila. B. & W. R. Co. vs. Schubert*, 224 U. S. 602, 56 L. Ed. 911. In the Schubert Case, Mr. Justice Hughes, speaking for the Court relative to the rule in question, used this language:

"The words, 'the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act,' do not refer simply to an actual intent of the parties to circumvent the statute. The 'purpose or intent' of the contracts and regulations, within the meaning of the section, is to be found *in their necessary operation and effect in defeating the liability* which the statute was designed to enforce. Only by such general application could the statute accomplish the object which it is plain that Congress had in view."

RULE COULD NOT PREVENT RECOVERY—RULE WAS WAIVED, EVEN IF DEFENSE NOT BARRED BY STATUTE.

In *Burho vs. Minneapolis & St. L. R. Co.*, 121 Minn. 326, 141 N. W. 300, the same doctrine being re-affirmed in *Otos vs. Great Northern R. Co.*, 128 Minn. 283, 150 N. W. 1022

(affirmed 239 U. S. 349), it was said that the carrier could not adopt rules and allow them to remain dormant and only bring them out for enforcement as a shield in a lawsuit. We quote the following from the Burho case:

> "It is plain that the promulgation of rules, which are *allowed to remain unenforced and dormant* until invoked *as a shield in a lawsuit*, is then to be given *scant consideration*, and will not serve to protect from liability for failure to comply with a mandatory statute. By this observation, based on the facts of this case, we do not intend to *intimate an opinion that a railway company may so frame and enforce rules that the protection intended to be given by the Federal Employers' Liability Act is taken away, especially in view of section 5 thereof.*"

In the cases mentioned, there was a rule that employees should not go between the ends of moving cars. The Court in each instance held that such rule could not be asserted as a defense because it was in violation of Section 5 of the Federal Act.

If it be said that the rule as to employing men over forty-five years of age did not have the purpose or intent of defeating recovery, the answer is the statement of this Court in the Schubert case, 224 U. S. 602, that *if the natural effect* of the enforcement of the rule *is to defeat liability*, the rule does contravene the statute.

In the Otos and Burho cases, the rule did not, in and of itself, say that violation thereof would prevent recovery in case of accident but the rule was general to the effect that employees should not go between the ends of moving cars. It was asserted as a defense in these cases and held unavailing to the carrier.

Payne vs. Daugherty (C. C. A., 8th Cir.), 283 Fed. 353, *supra*, lays down the same proposition with reference to a rule as to misrepresentation of age, physical condition, etc.

QUESTION 4.

The Thirty Day Rule.

Was the plaintiff's status as an employee, under the agreement between the Union and the carrier fixed so that he was immune from discharge after the expiration of thirty days following the date of his application?

It will be recalled that defendant's witnesses admitted that under the thirty day rule plaintiff would be immune from discharge after the thirty days because of anything which appeared in his application for employment.

Under the thirty day rule according to the admission of defendant's Chief Clerk, the Employing Officer, and the Superintendent, Schutt, after the expiration of thirty days, the employee would be immune from discharge on account of anything stated in the application (510-512) (410-414). The Arbitrators found that plaintiff's status became fixed after thirty days and that he was immune from discharge (see Finding quoted in opinion of Minnesota Supreme Court Record, page 256). The Minnesota Supreme Court said:

> "We accept the finding of the arbitrators based upon the testimony of defendant's witnesses that the employee became an accredited employee at the end of thirty days" (page 264).

There is fully as much reason for Rule 22, the thirty day rule, as there is for Rule 16, regarding employing persons over forty-five years of age.

Employees make application for work and if they are not

rejected after the thirty days, often change their place of residence, have their families moved and otherwise rearrange their affairs. They are safe in doing this because of the agreement of the Union with the employer that after the thirty day period the employee could not be discharged because of anything appearing in the application.

THE THIRTY DAY RULE A LIMITATION.

The thirty day clause is in effect a limitation which the parties have placed upon themselves.

They agree that after the lapse of that time no action can be taken. This is analogous to shipping contracts or drovers contracts. Such contracts have been upheld by the Courts when containing agreements between the parties that an action could not be maintained unless notice were given within thirty days. This was a limitation agreed upon by the parties. It was in effect a Statute of Limitations. This Court held such limitation valid. *Gooch vs. Oregon Short Line Co.*, 258 U. S. 20, 66 L. Ed. 443. The Thirty Day Rule of the Union and the carrier is in effect the same sort of limitation agreed upon by the parties in the Gooch case.

There is also an analogy between the thirty day rule and the incontestability clause found in insurance policies. These clauses have been generally upheld. See *Reegan vs. Union Mutual Life Ins.*, 189 Mass. 555.

PHYSICAL CONDITION IMPORTANT—AGE UNIMPORTANT.

As is true in life generally, the matter of age is not so important as physical condition. Borum was physically fit. The carrier was not particularly interested in enforcing its

rule as to age limits if the men had physical fitness. The employing clerk, Pagel, testified that they paid little attention to age, but did insist upon a physical examination.

If a misrepresentation of age bars recovery where is the line of demarcation? Would a misrepresentation of one day be sufficient? One month? One year? Two years? Five years? Fifteen years?

Would a misstatement in the application as to whether or not the applicant was married defeat a recovery?

Would a misstatement as to whether the applicant had ever had a claim against another company defeat recovery? A misstatement as to his religious affiliation? As to his political affiliations? As to his nationality?

A line has to be drawn somewhere if the Court should go to the harsh extreme of holding that a misrepresentation would bar a recovery.

CONSIDERATION OF THE ROCK CASE.

The Rock case has been so often referred to and has been distinguished in the Respondent's brief in opposition to the Granting of the Writ so that a lengthy discussion of the same is not necessary. We do not think the case in point. For Respondent to prevail it is not necessary that it be overruled. Some further discussion may, however, be helpful. Joe Rock, the plaintiff in that case, being physically unfit and having been rejected for employment, gave his name as John Rock, in a second application. He then had one Lenhart take the physical examination for him. Lenhart, claiming he was John Rock, took and passed the examination and Joe Rock, under the name of John Rock, and without having passed the physical examination, was employed. He was injured and recovery was denied because of the

gross fraud in securing employment.

The basis of the Rock decision was deception and fraud. The Railway Company was deceived:

1. As to Rock's identity.
2. As to his physical condition.

Even under these extreme circumstances—with this abhorrent fraud, still many lawyers feel that the decision of this Court in the Rock case is incorrect and departure from settled rules of law.

Of the decision in the Rock case, Professor Merrill in an article appearing in 43 *Harvard Law Review* 141, 28 *Michigan Law Review* 357, and 14 *Minnesota Law Review* 646, says,

> "The result reached, relieving the railway of the liability under which it would otherwise rest, solely because of the deception by which employment was secured, is in direct conflict with the vast majority of state decisions involving employer's liability at common law. Likewise it conflicts with the state decisions under the federal act and overrules at least one decision of a federal appellate court. That a decision is opposed to the numerical weight of authority or that it mars the symmetry of the logical structure of the law as developed from the analysis of decided cases is not, of course, an insuperable objection to it, but at least it casts a doubt upon its proper place in the fabric of the law. In this state of the authorities, therefore, it seems proper to examine the problem raised by the Rock Case from the standpoint of general contract principles, from the language of the Employers' Liability Act and from the standpoint of policy, in order to determine its correctness."

The learned Professor further says,

> "It seems unquestionable therefore that as a matter of common law principles relating to the status of master and servant Mr. Justice Butler's conclusion that Joe Rock never became the railway's employee cannot be sustained. Does the Employers' Liability Act use the term in any such specialized or restricted sense as would make attainment of the employee status conditional upon exercise of the utmost good faith in applying for a job? Nothing in the terminology of the act suggests such a restriction. It speaks solely of injury to persons 'employed by such carrier' and of 'employees' without qualification as to the manner in which they secured employment."

Again Professor Merrill uses this language quoted in part from *Robinson vs. B. & O. Ry. Co.*, 237 U. S. 84; 59 L. Ed. 849:

> "We are of the opinion that Congress used the words 'Employee' and 'Employed' in the statute in their natural sense, and intended to describe the conventional relation of employer and employee."

The statement was reiterated, accompanied by the remark that it hardly needed repetition, in *Hull vs. Philadelphia & Reading Railway*, 252 U. S. 475, *supra*. The Act itself furnishes no justification for a new definition of the words "employer" and "employee."

Professor Merrill also takes the position that the Rock case gives to the employing carrier rights which Congress never intended the carrier to have. Again we quote from his article:

> "To deny recovery in the event of injury, solely be-

cause of the misrepresentation, is giving the *employer* a wholly unexpected relief *which he in no manner deserves.*"

The Professor differs with Mr. Justice Butler as to the purpose of the act, saying:

"Not only, therefore, is the rule adopted in the Rock Case out of harmony with the general principles of law governing the master-servant relationship and with the current of prior decisions in similar cases; it is also out of harmony with the accepted judical rationale of the employer-employee relationship under the Employers' Liability Act and it fails to promote any purposes of expediency which might justify the departure from iogical harmony with the course of decision elsewhere. In spite of Mr. Justice Butler's declaration to that effect, the purpose of the Employers' Liability Act was not to dragoon the railroads into selecting operatives who are physically and mentally fit. There are other considerations of self interest which may be relied upon to secure that. The end in view was rather to place upon the industry the duty of caring for the human sacrifices to the demands of the machine age in a manner more satisfactory to modern thought than that provided by the rules of the common law. * * * It seems clear that the doctrine should not be extended beyond cases arising under the Employers' Liability Act. Is it too much to hope that the Court may yet overrule the decision in cases arising under that statute? If it is, then Congress should overturn it by express and unmistakable provision."

Professor Merrill, it will be noted, states that the situation is so serious that if the Rock case be not overruled

Congress should legislate in order to overcome the effect of this decision.

It is a matter of common knowledge that a very substantial percentage of men employed in railroad industry lie in order to get jobs.

Every person on the street knows this and the Courts take judicial knowledge of what is so commonly known. Appellee is not now contending that the Rock case should be overruled. But the doctrine has no application to a case of mere misstatement of age.

WHAT REMEDY FOR EMPLOYEES?

Suppose John Jones has worked for the Soo Line for twenty-five years. He is still employed by them. When he secured employment he misstated his age ten years. He is now past the age where he would be accepted as a new employee. If the Rock case is to be applied, what is Jones' position? Should he go to his master and say he lied to get a job? If this resulted in his discharge he could not secure new employment. He is too old to be reemployed. If he made out a new application for employment would he lose his seniority rights? Should he advise his employer of this misstatement? He is past middle age. He has a wife and children dependent upon him. He is in a hazardous occupation. If he is killed through his employer's negligence, can his dependents recover damages? The rule of the Rock case should not be extended to bar his recovery.

MEN OVER FIFTY MIGHT BE EMPLOYED.

Not only does the record show that men can work as switchmen for the Soo Line until they are sixty-five or even seventy years of age, but the Chief Employing Clerk admits (552) that he might employ a new man, even though he were fifty years of age. He said he would keep him for twenty-nine days, if he were needed, and then fire him before the expiration of the thirty day period.

IF ONE RULE ENFORCED, WHY NOT ANOTHER?

If the forty-five year limit rule is to be enforced, why not the thirty day rule? The rule which benefits the carrier, which is contrary to the spirit, if not the letter of the Employers' Liability Law, is sought to be enforced to prevent a recovery. But in the same breath the carrier asks that the thirty day rule be not enforced!

Without the rule the carrier does not even have the semblance of a standing in Court. It is only because of Borum's violation of the age rule that the carrier tries to avoid liability. In the Rock case there was a fraud which would have been present, *rule or no rule.* In the present case the defense is based solely on the violation of a rule.

Had Borum made his true age known to the Company before the accident, assuming that they did not know it, he could not be discharged for the misstatement of age because of the thirty day rule. A different situation would apply in the Rock case. There was actual deceit and mistake in identity in that case and upon a hearing there is no doubt but that Rock could have been discharged.

BORUM WAS AN EMPLOYEE.

Under the facts, Borum having worked seven years for the Soo Line immediately preceding his injury, he was an employee within the meaning of the Act.

Many a man lied to get into the Army at the commencement of the Civil War. Many a man gave his age as eighteen or nineteen when he was, in fact, fifteen or sixteen. If such a person had served four years during the Civil War, could he be considered during that time as a soldier—that is an employee of Uncle Sam? Would his Government try to deprive him of his pension because he was not a soldier, because he lied to get a job? The answer is obvious.

BORUM WOULD BE ENTITLED TO WAGES.

Let us suppose after Borum had worked seven years for the Soo Line they refused to pay him a month's wages because he misstated his age in the application for employment.

Before no Court in the world could the employer avoid payment of the wages because Borum had misstated his age, on the ground that this deprived him of the status of an employee. He worked for his master, he did his work properly and well. The master got the benefit of his work and certainly no Court could say that Borum should not have his wages because of a mere misstatement of age.

From what has been said the conclusion must follow that even if the Rock case is to be followed, the doctrine should not be applied to a case of mere misrepresentation of age.

Mr. Justice Butler in the very recent case of *Baltimore & Philadelphia Steam Boat Co. vs. Norton*, 52 Sup. Ct. 187, decided January 11th, 1932, said that *laws providing for the relief of injured employees should be construed liberally.*

There would be little liberality in depriving a man who had lost both legs of his full compensation merely because he misstated his age in order to get a job.

CONCLUSION.

A verdict for a plaintiff must rest on substantial evidence and not on speculation and conjecture. See *C. M. & St. P. Ry. Co. vs. Coogan*, 271 U. S. 472.

By the same token the defense of the carrier, based on fraud, must be tested by the rules generally governing fraud actions. The best that can be said for the carrier in this case is that there was a misrepresentation as to age.

No clear defense of fraud was made out, nor was there satisfactory evidence of reliance on the claimed fraud nor satisfactory evidence of damage as a result of the fraud. Taking the most favorable view of the evidence for Borum, it appears that the carrier actually knew his age. In view of the fact that the lower tribunals were unanimous in his favor, the evidence should be so considered. No tribunal found any fraud in this case.

The findings of the Arbitrators upon the question as to whether the carrier knew Borum's age was that the evidence was "unsatisfactory."

If the evidence relied upon by a plaintiff were unsatisfactory, recovery would be denied him. The finding of the Arbitrators, unanimously sustained by the Minnesota Courts, is that Borum *was* an employee; that the evidence as to whether *the* employer knew his real age was "unsatisfactory." Consequently there is no such fraud as found in the Rock case. "The finding is," as above stated, "and our sole concern is as to the action it requires." The language just quoted is taken from the opinion of this Court in *Minne-*

apolis, St. Paul & Sault Ste. Marie Ry. Co. vs. Moquin, 283 U. S. 52, 51 Sup. Ct. 501; 75 L. Ed. 1243.

If the Court does not give conclusive effect to the findings of the Arbitrators and the lower Courts, that the defense as to fraud is "unsatisfactory," then, and if the Court should decide the matter *de novo*, certainly, in the state of the evidence, the Court cannot say that the defense of fraud has been made out.

It is a cardinal rule that fraud without damage gives no right of action. Fraud without damage should be no defense.

The Employers' Liability Law should be liberally construed to effectuate its humane purposes, as the Courts have so frequently said. The construction contended for by Appellant is not humane or liberal, but harsh.

In conclusion, let us again refer to the appropriate statement appearing in the notes to the *Minnesota Law Review*, Volume 16, No. 2, pages 216-217, wherein it is stated that to make the doctrine of the Rock case applicable to the present case "*would extend the doctrine of the Rock Case to a harshness beyond reason.*"

Respectfully submitted,

TOM DAVIS,

ERNEST A. MICHEL.

SUPREME COURT OF THE UNITED STATES.

No. 585.—October Term, 1931.

Minneapolis, St. Paul & Sault Ste. Marie Railroad Company, Petitioner,
vs.
James M. Borum.

On Writ of Certiorari to the Supreme Court of the State of Minnesota.

[May 23, 1932.]

Mr. Justice Butler delivered the opinion of the Court.

In October, 1921, petitioner accepted respondent's application for work as a switchman, and the latter in December, 1928, was injured while employed in interstate transportation. He brought this action in the district court of Hennepin county to recover damages under the Federal Employers Liability Act (45 U. S. C., §§ 51-59) and, after issue was joined, the parties made an agreement for arbitration under a statute of Minnesota (G. S. 1923, §§ 9513-9519) pursuant to which the company paid plaintiff $12,500 to be retained by him in any event. And it was agreed that, if the arbitrators found for plaintiff on the merits, the award should be $12,500 in addition to the amount so paid. The arbitrators made findings of fact and held that plaintiff's injuries were caused by defendant's negligence and that he was entitled to recover the stipulated amount. A motion made by defendant to vacate having been denied, the district court entered judgment for plaintiff in accordance with the award and the supreme court affirmed. 184 Minn. 126.

Defendant's contention here is that the state court erred in sustaining the finding that plaintiff was an employee within the meaning of the Act as construed in *Minneapolis, &c. R. Co.* v. *Rock*, 279 U. S. 410.

Plaintiff made application in writing to defendant for employment as switchman. Then, and continuously thereafter while plaintiff worked for it, defendant had a rule, No. 16, promulgated to promote safety and efficiency in the operation of its railroad,

which declared that no person over 45 years should be taken into the service. Another rule, No. 22, was to the effect that applications for employment in the yard service not rejected within 30 days would be considered accepted. And there was one, No. 4 (A), stating that all employees who attain the age of 65 will be retired.

When plaintiff made his application he was 49 years old and understood that defendant had a rule against accepting men over 45 to work in its train service. He falsely stated in his application that he was 38 years old and, when submitting to a physical examination required of applicants for employment, he again so misrepresented his age. This statement was relied upon by the examining surgeon and was in part the basis of his finding and report that plaintiff was in good health and acceptable physical condition. It was a general practice of men, over the age specified in the rule, when applying for such work on the railroads of defendant and other carriers in the Northwest falsely to represent their ages to be within the specified limit, and that practice was known to the defendant. The arbitrators were unable to find whether defendant knew plaintiff was over 45 years. They did not find, nor does the evidence require a finding, that defendant was deceived by plaintiff's false statements or that it accepted his application because of or in reliance upon them. The application was not rejected within 30 days and, under rule 22, must be deemed to have been finally accepted. Under the terms of the contract of hiring, defendant did not without more have the right to remove plaintiff from its service on account of such misrepresentation. Plaintiff worked for defendant as a switchman for about seven years and when injured was well under the age for retirement. His work was satisfactory. Neither his age nor his physical condition contributed to cause his injury.

In *Minneapolis, &c. R. Co.* v. *Rock*, *supra*, this Court held that one who obtained employment as a switchman for an interstate carrier by railroad by fraudulently evading the company's rule requiring applicants to submit to a physical examination and who suffered injury in the course of employment in interstate transportation, while the company remained unaware of the deception, was not as of right an employee within the meaning, or entitled to the protection, of the Federal Employers Liability Act and could not maintain an action for injury under that statute.

Rock was an impostor. He applied for work under his true name and was rejected upon examination because his physical condition was found unacceptable under the carrier's reasonable rule and practice. Later, representing that he had not theretofore made application, he applied again but under a different name and procured another man to impersonate him and in his place to submit to the required physical examination. And, by means of the surgeon's report upon that man's condition, Rock deceived the company and thereby secured the employment in which, about a year later, he suffered injury. The court said (p. 414): "The deception . . . set at naught the carrier's reasonable rule and practice established to promote the safety of employees and to protect commerce. It was directly opposed to the public interest, because calculated to embarrass and hinder the carrier in the performance of its duties and to defeat important purposes sought to be advanced by the Act. . . . (p. 415.) While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do was a continuing wrong in the nature of a cheat. The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment his status was at all times wrongful, a fraud upon the petitioner, and a peril to its patrons and its other employees. Right to recover may not justly or reasonably be rested on a foundation so abhorrent to public policy".

Here, defendant could not have regarded the difference between plaintiff's actual age and that stated in his application as having any material bearing upon the physical condition it required. The arbitrators did not find, and the evidence does not show, that plaintiff's false statement of his age substantially affected the examining surgeon's conclusion that he was in good health and acceptable physical condition or that, if he had given his real age, the surgeon would have found otherwise. Indeed the surgeon's testimony shows that, save in exceptional cases, defendant, in accordance with its established rules, permits its switchmen to continue in the service until they are 65 years old without any physical examination after they are employed. Plaintiff's physical condition was not shown to be such as to make his employment incon-

sistent with the defendant's proper policy or its reasonable rules to insure discharge of its duty to select fit employees. The evidence indicates that, under its own interpretation of rule 22 together with the schedule constituting the agreement between defendant and its switchmen, defendant after the final acceptance of plaintiff's application was not free to discharge him on account of the false statement as to his age.

It is clear that the facts found, when taken in connection with those shown by uncontradicted evidence, are not sufficient to bring this case within the rule applied in *Minneapolis, &c. R. Co.* v. *Rock, supra,* or the reasons upon which that decision rests.

Judgment affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.